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No. 78-488

Supreme Court, U.S.
FILED
SEP 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATED IN MONROE AND PIKE COUNTIES,
COMMONWEALTH OF PENNSYLVANIA, AND
BENEDICT F. PASTORINI, ET AL.,
SOUTHEASTERN PENNSYLVANIA SYNOD OF THE
LUTHERAN CHURCH IN AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 576 F.2d 983. The opinion of the district court denying the motion for a new trial (App. B) is not reported. The opinion of the court of appeals on an earlier interlocutory appeal (App. C) is reported at 506 F.2d 796.

JURISDICTION

The judgment of the court of appeals (App. D) was entered on March 27, 1978. A timely petition for rehearing was denied on May 24, 1978 (App. E). On August 14 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when not-for-profit facilities owned by a church or other private entity are condemned, the proper measure of just compensation under the Fifth Amendment is the fair market value of the facilities taken, rather than the cost of providing substitute facilities.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

On June 15, 1970, the United States filed a notice of condemnation and a declaration of taking to condemn, as part of the Tocks Island Recreation Project, approximately three hundred acres of land owned by the Southeastern Pennsylvania Synod of the Lutheran Church in America ("the Synod") (App. A, *infra*, 3a). The Synod had operated on this property, on a not-for-profit basis, three summer camps for young people (*ibid.*).

Prior to the trial on the issue of the compensation due for the taking, the Synod sought a ruling that the proper measure of just compensation was the cost of constructing replacement camping facilities at a new site, rather than the fair market value of the condemned property. In 1964, anticipating that its property would be condemned for the Tocks Island Project, the Synod had purchased 3,800 acres in the nearby Pocono Mountains to serve as a replacement site (*id.* at 6a). The Synod offered to prove that the cost of development of new camps on the new site would be in excess of $5.8 million, whereas the government had offered $485,000 based on the estimated fair market value of the condemned property (App. C, *infra*, 78a-79a).

The district court rejected the Synod's argument. It held that only where the condemnee was a governmental entity was just compensation properly measured by the cost of replacing the condemned facilities, rather than the fair market value. The court therefore ruled that the evidence at trial would be restricted to the fair market value of the property at the time of taking, or, if that measure was unavailable, to the depreciated replacement cost of the property at that time (App. C, *infra*, 77a-78a).

On an interlocutory appeal under 28 U.S.C. 1292(b), the Third Circuit reversed. It held (App. C, *infra*, 87a)

> that the substitution of facilities measure of fair compensation is available to private owners of non-profit community facilities as well as to public owners of such facilities, in appropriate cases.

The court described such cases as those in which the facilities have no ready market and are "reasonably necessary to public welfare" (*id.* at 83a; see also App. A, *infra*, 20a-27a; but see *id.* at 30a-31a and 44a n.1). At that preliminary stage, the court expressed no opinion on whether application of the substitute-facilities test would be appropriate in this case (App. C, *infra*, 87a).

On remand, the trial was divided into two phases. In the first phase, the jury considered whether the substitute-facilities measure of compensation was applicable. After 10 days of trial, the question was submitted by special interrogatory, and the jury found that the substitute-facilities measure was not applicable (App. A, *infra*, 4a). In the second phase of the trial, the jury considered the award to which the Synod was entitled under the fair market value test (*ibid.*). The jury determined th~~a~~e amount of just

compensation to be $740,000 (*ibid.*). The district court denied the Synod's motion for a new trial, (App. B, *infra*), and the Synod filed its second appeal.

A sharply divided panel of the Third Circuit reversed again (App. A, *infra*, 1a-63a). Judge Van Dusen, in an opinion announcing the judgment of the court and joined in part by Judge Stern, concluded that the special interrogatory had been submitted to the jury in a confusing and misleading manner, in the light of the district court's instructions and of certain comments made by government counsel in summation.[1] The majority determined that even though the Synod had not objected to the district court's instructions on the criteria for application of the substitute-facilities measure of damages, or to the form of the special interrogatory, reversal was required because the jury had been left "without adequate guidance on a fundamental question" and "[f]ailure to rectify this error could result in a miscarriage of justice because it could mean that the Synod would receive several million dollars less in compensation than that to which it is entitled" (*id.* at 9a).

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[1] The government had argued in summation that even though the Synod had not been operating its camps for monetary profit, testimony of the Synod's witnesses could lead to the conclusion that the camps were operated for "a spiritual profit," in the sense of promoting the Lutheran religion or religious teachings (App. A, *infra*, 10a-11a). The majority of the court of appeals held that these remarks misstated the law, since the court's interlocutory opinion had referred only to profit in the monetary sense (*id.* at 11a). Moreover, since these remarks might have suggested that the Synod used the camps to proselytize, and thus might have encouraged the jury to find against the Synod so that taxpayers' money would not be used to build new camps where campers could be converted to the Lutheran faith, the court criticized the remarks as inaccurate and highly prejudicial (*id.* at 13a). Judge Stern, who concurred, agreed that the remarks were improper, but considered that such a line of argument was "justified—even compelled" by the court's earlier interlocutory ruling (*id.* at 37a-38a). Judge Rosenn, who dissented, argued (*id.* at 59a n. 12) that this line of argument was permissible, though it "may encounter first amendment problems at some point."

The court of appeals majority stated the holding of the earlier interlocutory appeal as follows (*ibid.*):

> In *564.54 Acres I* we held that the substitute facilities doctrine applied to privately owned property if three conditions were met: (1) the property must be operated on a not-for-profit basis; (2) there must be no ready market for the particular type of property; and (3) the property, or facilities, must be "reasonably necessary to the public welfare."

The majority found that the district court's instructions regarding two of these conditions were not entirely consistent with the interlocutory ruling. The instructions on the requirement that there be no ready market contained "no fundamental error" but were "somewhat confusing at one point," so that clarification of this condition by the court of appeals would be helpful to the district court on remand (*id.* at 15a). The majority accordingly explained (*id.* at 18a, footnote omitted) that under *564.54 Acres I*,

> regardless of whether the Synod could have sold the camps, and regardless of whether the camps had [a] fair market value, this condition of the substitute facilities doctrine is met if the Synod could not have replaced the camps' facilities in the market place for a cost roughly equivalent to the fair market value of the camps.

With respect to the requirement that the facility be "reasonably necessary to the public welfare," the majority found that the district court's instructions had been confusing and misleading. The court explained that to meet this condition a facility need not be entirely necessary or indispensable to the community, but need only "provide a benefit to the community that will not be as fully provided after the facility is taken" (*id.* at 26a). The court concluded that even though the district court's instruction had referred to "fulfilling a community need or purpose," it had been erroneous because it "never equated 'reasonably necessary' with community benefit," and because it seemed to require a showing of strict necessity rather than simply community benefit (*ibid.*).[2]

The majority accordingly remanded the case for a new trial pursuant to the standards explained in its opinion.

Judge Stern concurred, under compulsion of the court's earlier decision on the interlocutory appeal (*id.* at 28a-39a). He agreed that the district court's instructions were "confusing, contradictory, and, in some measure, erroneous" (*id.* at 30a). But he criticized both the earlier decision and the revised standards set forth by Judge Van Dusen. With respect to the "reasonably necessary" or "community benefit" standard in particular, he observed that "application of this standard illuminates the basic flaw of the interlocutory appeal's holding that private, nonprofit owners are entitled to the cost of substitute facilities measure of compensation" (*id.* at 32a-33a).

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[2] Restating the three conditions, Judge Van Dusen (in a portion of the opinion not joined by Judge Stern) stated the third condition solely in terms of "community benefit": "[T]he facility must have provided a benefit to the community that will not be as fully provided after the facility is taken," and noted that he had deliberately avoided use of the expression "reasonably necessary" (*id.* at 28a & n. 17).

Judge Stern pointed out that, once the substitute-facilities measure of compensation is extended to condemnees that are not governmental entities, "the courts are simply in no position to insure that the compensation award will continue to be devoted to serving a community purpose or the particular community purpose which the jury has found makes the community a better place in which to live" (*id.* at 35a). He questioned, moreover, why the extension should be limited to private entities that operate on a not-for-profit basis, since profit-making entities also provide benefits to the community (*id.* at 34a-35a). And he noted that "a windfall *necessarily* occurs upon application of the doctrine of the cost of substitute facilities," since "the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated facilities with brand new ones," with no deduction for depreciation (*id.* 35a-36a and n.2 (emphasis in original)).

Where church-owned property is involved, Judge Stern found significant constitutional concerns. Supervision of the use of the condemnation award to ensure its devotion to substitute facilities might improperly entangle church and state, while if the condemned facilities were not replaced, the payment of a sum far in excess of fair market value might be an impermissible aid to religion (*id.* 36a-37a). Even "more fundamentally," Judge Stern considered that the basic inquiry into whether a religious organization provides a "benefit" to the community "is obnoxious under our constitutional framework" (*id.* at 37a).

Judge Rosenn dissented (App. A, *infra*, 40a-63a). He thought that the trial court's instructions were consistent with the court's opinion on the interlocutory appeal, and that any error in them was "minimal and nowhere near the magnitude of fundamental" (*id.* at 40a). He concluded that in view of the ambiguity of the court's interlocutory opinion and the novelty and uncertainty of the points at issue, the majority "exceed judicious expectations by demanding that a district judge conform to standards never before enunciated by the appellate court" (*id.* at 45a).

REASONS FOR GRANTING THE PETITION

1. This case presents an important and novel question concerning the measure of the "just compensation" required by the Fifth Amendment when private property is taken for public use. Generally, the damages to which the condemnee is entitled are measured by the fair market value of the property taken. *E.g., Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973). A

different measure has been employed, however, when the property belongs to a governmental entity that has a duty to replace the condemned facility.[3] In such cases, the condemnee has been awarded the cost of procuring or constructing the substitute facilities. *E.g.*, *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 802-804 (2d Cir. 1968); see *Brown* v. *United States*, 263 U.S. 78, 82-83 (1923) (dictum). The decision of the court below is the first decision of a federal court of appeals—and, so far as we know, of any court—extending the "substitute facilities" measure of compensation to a condemnee that is not a governmental entity.[4]

If the decision is allowed to stand, it will authorize awards to private condemnees that far exceed the amounts required to make them whole by the fair market value standard. In the present case, for example, a witness for the Synod testified that $4.36 million was a "conservative estimate" of the cost of

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[3] The term "private property" in the Fifth Amendment has been held to include public property belonging to a state or local government. See, *e.g.*, *United States* v. *Game, Fish & Parks Department*, 329 F. 2d 665 (8th Cir. 1964), cert. denied, 379 U.S. 900 (1964); *Jefferson County* v. *Tennessee Valley Authority*, 146 F.2d 564 (6th Cir. 1945), cert. denied, 324 U.S. 871 (1945); *Town of Bedford* v. *United States*, 23 F.2d 453 (1st Cir. 1927).

[4] The court of appeals was mistaken (App. C, *infra*, 84a) in citing *Newton Girl Scout Council, Inc.* v. *Massachusetts Turnpike Authority*, 335 Mass. 189, 138 N.E. 2d 769 (1956), as authority for its decision. In that case the Massachusetts Supreme Judicial Court held only that the trial court had erred in excluding "[a] substantial amount of evidence of the value of the property for the special uses for which the property was best adapted," with the result "that the Girl Scouts were prevented from showing the real character and extent of the money loss which had been suffered" when a toll highway was built on secluded property that had been used for camping. 138 N.E. 2d at 772. The Girl Scouts did not seek and were not awarded compensation for the cost of obtaining substitute facilities, but rather for loss of the "special value" of the property. 138 N.E. 2d at 775.

the substitute camping facilities (App. A, *infra*, 5a), while the jury found the fair market value of the condemned facilities to be $740,000. The decision has already been followed. In three pending district court cases the owners of a Masonic Temple,[5] a Methodist church camp,[6] and an alcoholic rehabilitation center[7] have been held to be entitled to compensation measured by the cost of substitute facilities instead of the fair market value of the property taken.

2. The court of appeals erred in concluding that there is "no basis for distinguishing between governmental and private community uses" (App. C, *infra*, 86a) for the purpose of measuring just compensation under the Fifth Amendment. The substitute-facilities measure was developed "to meet the unique needs of public condemnees." *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803. The doctrine was first applied in cases involving the condemnation of public facilities such as streets, highways, bridges, and sewer systems, where the traditional fair market value test is unworkable because the facilities are not normally bought and sold in the open market and are seldom operated at a profit. See, for example, *Clarksville, Va.* v. *United States*, 198 F.2d 238, 243 (4th Cir. 1952);

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[5] *United States* v. *Certain Land in the City of Ann Arbor, County of Washtenaw, etc.*, E.D. Mich., Civil No. 4-72667 (1974).

[6] *United States* v. *958.52 Acres of Land in Cowley County, Kansas, The Central Kansas Conference of the Methodist Church* (Camp Horizon), D. Kan., Civil No. 75-77 (1975).

[7] *United States* v. *122.20 Acres of Land in Cowley County, Kansas, Wichita Fellowship Club, Inc.*, D. Kan., Civil No. 77-1098 (1977).

United States v. *Los Angeles*, 163 F.2d 124 (9th Cir. 1947); *Woodville* v. *United States*, 152 F.2d 735 (10th Cir. 1946); *United States* v. *Wheeler Township*, 66 F.2d 977, 984 (8th Cir. 1933). The doctrine was subsequently extended to schools and other public buildings, notwithstanding that some type of market value arguably could be established for them. See *United States* v. *Board of Education*, 253 F.2d 760, 764 (4th Cir. 1958); *United States* v. *Certain Property in the Borough of Manhattan, supra*, 403 F.2d at 803.

In all of these cases, the substitute-facilities measure of compensation was employed in order to indemnify the community fully for the loss of an essential public facility, a facility that the public condemnee was under a duty to replace. See *United States* v. *Certain Property in the Borough of Manhattan, supra*, 403 F.2d at 803-804. This special measure of valuation for publicly owned facilities is founded on recognition that a public entity, unlike a private owner, "does not hold the property for its own benefit or private gain, but for the public need." *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge*, 246 F.2d 823, 824 (3d Cir. 1957). As the court of appeals stated in *United States* v. *Wheeler Township, supra*, 66 F.2d at 984-985,

> * * * [we] must be guided by this record as to what money loss will fall upon the township because of the condemnation. It is the duty of the township to maintain its roads and that duty can be enforced * * * . The expense therefor

> comes from the taxpayers of the township, for whom the township is (in a sufficient sense) trustee and representative. The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and "the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town." [Citation omitted.] To the extent that this burden has been increased by this taking there is a deprivation for which the law requires compensation.

As the Second Circuit emphasized more recently in *United States* v. *Certain Property in the Borough of Manhattan, supra*, 403 F.2d at 803, the public condemnee's entitlement to the cost of substitute facilities flows from its obligation to replace the facilities condemned:

> When the public condemnee proves there is a duty to replace the condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. The duty may be legally compelled or one which arises from necessity; the distinction has little practical significance in public condemnation.* * * [Citations omitted.]

Accordingly, the courts have uniformly recognized that when the public condemnee is not required to provide substitute facilities, its compensation is limited to the fair market value of the property taken. *United States* v. *Streets, Alleys and Public Ways*, 531

F.2d 882, 885-886 (8th Cir. 1976); *United States* v. *Certain Property in the Borough of Manhattan, supra*, 403 F.2d at 803-804; *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge, supra*, 246 F.2d at 824; *Washington* v. *United States*, 214 F.2d 33, 39 (9th Cir. 1954).

The rationale of the cases developing the substitute-facilities measure of compensation for publicly owned property is inapplicable to privately owned property. Although privately owned facilities may, of course, provide a benefit to the community, they are not held in trust for the public but for the purposes and interests of the private owner. As the court below observed (App. C, *infra*, *79a)*:

> Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission.

Indeed, as Judge Stern pointed out, there is no principled distinction, under the "benefit to the community" test adopted by the court below, between private nonprofit entities and private entities that seek to make a profit (App. A, *infra*, 34a-35a):

> A privately owned factory enriches the community by providing jobs for its residents and monies for its tax coffers. A privately owned home benefits the community by sheltering some of its residents. A community may well be a better place in which to live if its residents have jobs, or shelter, just as it may be a better place to live if there are museums or summer camps open to its children or legitimate theatres run for profit.

Unlike a public entity, a private owner has no duty—neither one which is "legally compelled or one which arises from necessity" (*United States* v. *Certain Property in the Borough of Manhattan, supra*, 403 F.2d at 803)—to replace condemned facilities that may benefit the community or to continue their use in the same manner. A private condemnee such as the Synod in this case may, if it chooses, use its condemnation award to replace the condemned facilities, but it has no obligation to do so, and the community has no recourse or compensable interest if it does not. The private condemnee need not devote the award to any use designed to "benefit the community" as distinguished from the condemnee's own purposes. And even if it does use the award initially to replace the facilities condemned, it has no obligation to continue that use.

Accordingly, to award a private condemnee the cost of substitute facilities in order to compensate for *the community's* loss contravenes what this Court has identified as "[t]he guiding principle of just compensation"—"reimbursement to the owner for the property interest taken. 'He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.' *Olson* v. *United States*, 292 U.S. 246, 255." *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). See, *e.g.*, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-474 (1973); *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970).

The rule of the court below would, in several ways, go beyond what is required to make the condemnee whole. The benefit that privately owned facilities may provide to the community is, necessarily, only a part of the purposes they serve (see App. C, *infra*, 79a, quoted at page 14, *supra*). To measure the private condemnee's compensation by the cost of constructing substitute facilities invokes the community's loss to provide the owner with specially generous compensation for its own loss as well. In addition, as Judge Stern pointed out, a windfall necessarily results from the ruling of the court below that the private condemnee is to be awarded the cost of substitute facilities with no deduction for depreciation—"the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated, facilities with brand new ones." App. A, *infra*, 34a-35a & n. 2; see App. C, *infra*, 81a-82a; compare *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 804, and other authorities cited in App. A, *infra*, 35a n. 2. Finally, the condemnee's windfall is enhanced by the inability of the courts or the community to insure that the compensation award will be

devoted to the particular community purpose that was found to justify it, or to any other community purpose.

3. The present case illustrates both the difficulty of establishing workable judicial criteria for applying the substitute-facilities doctrine to private condemnees, and also the special dangers posed by extension of the doctrine in cases involving property owned by a religious entity.

Recognizing that the doctrine originates with the need to make public condemnees whole by enabling them to replace essential public facilities, the court of appeals in its first, interlocutory decision adopted the test, taken from public-condemnee cases, that the property or facilities must be "reasonably necessary to [the] public welfare." App. C, *infra*, 83a; see App. A, *infra*, 20a; *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 804. In its second decision, however, the majority of the court relaxed its test. The court's new rule requires only that the condemned facility "must provide a benefit to the community that will not be as fully provided after the facility is taken" (App. A, *infra*, 28a), and Judge Van Dusen further advised that the words "reasonably necessary" should be avoided (*id.* at 28a n.17). This "community benefit" standard is not only novel, but as applied to privately owned facilities it leaves the adjudicator peculiarly at large. As we have already noted, the question arises why it is only private entities that operate on a nonprofit basis, and not profit-making ones, that may be regarded as providing a benefit to the community.[8] In addition, the standard requires very free value judgments on whether or not particular facilities provide "a benefit to the community." Thus, Judge Rosenn in his dissent (App. A, *infra*, 53a-54a, 56a nn. 9, 11) inquired about "private nonprofit swimming clubs, ice-skating clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations * * * *." In reply, the majority relied heavily (*id.* at 25a n. 15) on the jury: "[S]ince the jury is the conscience of the community, we must assume that any facility a jury finds beneficial to the community or rationally related to public welfare would not be found 'frivolous' by the community." Such open-handed deference to the jury, on a question so broad and novel as "community benefit," might be questioned in any legal context. It is particularly questionable here because this Court has held that it is the judge, not the jury, who must decide "all issues" in condemnation cases "other than the precise issue of the amount of compensation to be

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[8] The court noted (App. A, *infra*, 26a) that "the Synod attempted to show that the camps helped alleviate the 'gang' problem in inner-city Philadelphia" and stated that "[i]f the camps did help reduce such juvenile crime, then they provide a benefit to the entire community of Eastern Pennsylvania, not just to the campers." If a private employer's business establishment in inner-city Philadelphia is condemned, why should he not be equally entitled to the substitute-facilities measure of compensation if he could show that by employing inner-city youths he contributed to alleviation of the problem of juvenile crime?

awarded." *United States* v. *Reynolds*, 397 U.S. 14, 20 (1970).[9]

When the condemned property belongs to a church, as in this case, availability of the substitute-facilities measure of compensation gives rise to additional problems. The central requirement adopted by the court below is that the condemned facility "must provide a benefit to the community that will not be as fully provided after the facility is taken" (App. A, *infra*, 26a). But, as Judge Stern warned in his concurring opinion, a governmental inquiry to determine whether an activity engaged in by a church "benefits the community" is "obnoxious under our constitutional framework. The judge or jury has no right to pass on the 'benefit' or the 'necessity' to the community of such installations" (App. A, *infra*, 37a). "This is not an appropriate area of inquiry for a jury or for a judge, but it is unavoidable once the substitute facilities doctrine is made applicable to owners of church property" (id *at* 38a)[10]

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[9] The government accordingly argued at trial that applicability of the substitute-facilities doctrine was a question for the court, not the jury. The Synod did not join in this argument. But after the question was given to the jury and a verdict rendered against the Synod, the Synod argued on appeal that the question should have been decided by the court. The court of appeals refused to consider the argument because the Synod had not made it below (App. A, *infra*, 7a n.1).

[10] The inquiry may be even more questionable in view of the trial court's instruction—which the court of appeals did not disapprove—that "the furthering of the Church's religious mission may itself constitute a service to the community" (Tr. 798; see App. A, *infra*, 55a n.10). See also the statement of the court of appeals on the interlocutory appeal (App. C, *infra*, 79a) that "[a] closely analogous case would be the condemnation of an ancient church building still in active use for religious purposes."

The windfall that redounds to the religious condemnee presents additional First Amendment difficulties. For the government to award to a church compensation that exceeds the market value of the condemned property, and to dispense with any deduction for depreciation, might itself be considered an impermissible aid to religion. The constitutional qualms are increased where, as here, the facilities to be replaced serve purposes (in addition to the "community benefit" they provide) that are explicitly religious.[11] To the extent that the substitute-facilities measure of compensation provides the church with an award in excess of the fair market value of the condemned property in order to permit the replacement of facilities pursuing religious ends, questions are raised under the prohibition of the Establishment Clause against the "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 772 (1973), quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).

On the other hand, if the Synod obtains an award under the substitute-facilities measure and does not use it to construct and maintain the substitute camping facilities, it will receive a windfall and will not restore the community benefit on which the award was premised. Yet the Synod is legally free to do as it wishes with the award. If it obtains the $4 or $5

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[11] For example, as Judge Stern pointed out (App. A, *infra*, 38a). "[t]here was evidence that each of the three condemned campsites included a chapel and that cabin devotions were part of the camp day and that religious classes were part of the camping program."

million that it claims, instead of the $740,000 that the jury awarded under the fair market value standard, it need not use the money to construct and operate summer camps comparable to the condemned facilities, and certainly need not do so indefinitely. It may use the award to train missionaries, to pay Lutheran ministers, to build a new church, to serve any of its other institutional purposes. Even after constructing substitute facilities, it will be free to determine at any time that the camps should be run exclusively for Lutherans and entirely on a religious basis, that they should be transformed into training facilities for missionaries, or that they should be put to any other use consistent with the Synod's institutional purposes and needs.[12]

Yet any attempt to avoid this problem by seeking to supervise or control the Synod's use of the award would be no less objectionable. Any effort to require that the Synod actually employ the award to replace its camps with nondenominational camps providing the same community benefit that the jury found to exist—and that the Synod continue to operate the new camps on that basis—would entangle the government in supervision of the Synod's operations and so run equally afoul of the First Amendment. See *Walz* v. *Tax Commission, supra,* 397 U.S. at 670; *Lemon* v. *Kurtzman,* 403 U.S. 602, 619 (1971).

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[12] We by no means suggest that the Synod now contemplates such a course, or that any such change would involve bad faith on the part of the Synod. The Synod does and should remain free to employ and redirect its resources in accord with its own institutional purposes. The same is true of a public entity: "Modern government requires that its administrators be vested with the discretion to assess and reassess changing public needs." *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803-804 (footnote omitted). The difference is that in the case of a private entity there is no legal requirement that the redirection of resources be in accordance with "public needs," much less with the particular public need that was held to justify application of the substitute-facilities doctrine.

Moreover, under the approach adopted by the court of appeals, consideration of the likelihood that a benefit will accrue to a religious entity if its property is taken could influence governmental determinations of whether a particular property should be condemned. The potential will arise for discrimination for or against particular religious or other private entities, and for division between supporters of a particular group and those who oppose the provision of any benefit to the group. Preventing such divisions along religious lines is one of the chief purposes of the First Amendment. See *Lemon* v. *Kurtzman, supra,* 403 U.S. at 622-623.

4. This case is one of the rare exceptions to the general rule that a judgment remanding a case for a new trial does not warrant review at that stage by this Court.

The question presented here—whether the Fifth Amendment requires that compensation for the taking of private property operated on a non-profit basis be measured by the cost of obtaining substitute facilities, where the condemned facilities are found to provide a benefit to the community—is an important and clear-cut legal issue that controls the further conduct of this case. In similar circumstances, where the issue presented was "fundamental to the further conduct of the case," this Court has granted immediate review. *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 152-154 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 685 n. 3 (1949); *Land* v. *Dollar,* 330 U.S. 731, 734 n. 2 (1947). Indeed, *United States* v. *General Motors Corp., supra,* 323 U.S. 373, like this case, was a condemnation proceeding in which the issue was the measure of just compensation required by the Fifth Amendment.[13]

Although the policy against piecemeal appellate review generally promotes judicial efficiency and hastens the ultimate end of litigation, denial of review at this point in this case will only prolong the litigation and waste the resources of both courts below and of the parties. Retrial is not necessary to flesh out the legal issue and place it in a factual context. The record of the trial already held includes, in its first phase, the proofs submitted by the parties under the substitute-facilities theory of compensation, as well as, in its second phase, the proofs under the fair market value theory.

If this Court grants review now and holds that the substitute-facilities measure of compensation may not be invoked by a private condemnee, there will be no need for any retrial. Since the court of appeals found no error affecting the jury's verdict awarding $740,000 on the fair market value measure of compensation, judgment will simply be entered for that amount. On the other hand, resources will be wasted if this Court should deny review now but ultimately grant review and hold that the substitute-facilities measure of compensation may not be invoked by a private condemnee. In that event, both the retrial—which will be devoted solely to determining the availability of the substitute-facilities measure under the standards clarified by the second opinion of the court of appeals, and the award due under that measure if it is available—and the appeal that will inevitably follow to the court of appeals (the third appeal in this case) will have been needless.

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[13] In *General Motors, supra,* 323 U.S. at 381-383, the property taken was a brief portion of the unexpired term of a leasehold on a warehouse. The Court concluded that the value of the occupancy was the market rental value of the premises on a lease by the long-term tenant to a temporary occupier, not the value on a long-term lease of an empty warehouse. The factors that would affect the market price of the sublease included the cost of moving out the property of the long-term lessee and of preparing the space for the subtenant's occupancy. *Id.* at 383.

Even if this Court is going to affirm the conclusion of the court of appeals that a private condemnee may invoke the substitute-facilities measure of compensation, a retrial before review by this Court is likely to be a wasted effort. The court below was deeply divided not only on the basic question of whether the substitute-facilities doctrine is available to private condemnees, but also on the criteria that should govern its availability. (Indeed, the two decisions of the court of appeals stated those criteria differently.) If this Court will ultimately agree with the court of appeals that the substitute-facilities measure may be invoked by private condemnees, but will disagree with the latest formulation by that court of the governing criteria (including the holding that the question is for the jury), the Court should render that decision now so that the retrial may proceed under the correct standards.

In addition, there is a special and forceful reason for this Court to grant review now in this case. Application of the substitute-facilities doctrine at the retrial, in accordance with the majority opinion of the court of appeals, will present serious First Amendment issues. Where the condemnee is a religious organization, the substitute-facilities doctrine as formulated by the court of appeals requires the government to litigate the question whether the religious organization is providing "a benefit to the community" (App. A, *infra*, 26a). The government believes it should not be required to make such an argument. Judge Stern concluded that such an inquiry is "obnoxious under our constitutional framework" and that it would be "grotesque to find the United States Government making such an argument" (App. A, *infra*, 38a). Review by this Court should be granted before the government is required to present (for the second time) a defense raising this serious question of constitutional propriety.[14]

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[14] The panel's disagreement regarding the propriety of the government's reference during closing argument to the notion of "spiritual profit" (see page 5 n. 1, *supra*) highlights this problem. Although he joined Judge Van Dusen in holding that these remarks were improper, Judge Stern recognized that "this argument is justified—even compelled—by *564.54 Acres I* which requires the court to determine and the government to litigate the reasonable community necessity of the thing condemned" (App. A, *infra*, 37a-38a). Judge Rosenn, in contrast, concluded that this line of argument was permissible, although it "may encounter first amendment problems at some point" (*id.* at 59a n.12).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1238

UNITED STATES OF AMERICA

v.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATED IN MONROE AND PIKE COUNTIES,
COMMONWEALTH OF PENNSYLVANIA, AND
BENEDICT F. PASTORINI, ET AL.
Southeastern Pa. Synod of Lutheran
Camp of America,

Southeastern Pa.
Synod of Lutheran
Camp of America,
Appellant

(D.C. Civil No. 70-240)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued October 21, 1977

BEFORE ROSENN AND VAN DUSEN, *Circuit Judges*
AND STERN, *District Judge**

H. OBER HESS, ESQ.,
M. CARTON DITTMANN, JR., ESQ.,
PETER M. MATTOON, ESQ.,
HENRY W. ASBILL, ESQ.,
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JAMES W. MOORMAN,
Acting Assistant Attorney General;
PETER R. TAFT, EDMUND B. CLARK,
PETER H. RUVOLO & PETER R. STEENLAND, JR.,
Attorneys;
U.S. Department of Justice,
Washington, D.C.,
Attorneys for Appellee

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* Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

OPINION ANNOUNCING JUDGMENT OF THE COURT

(Filed March 27, 1978)

VAN DUSEN, *Circuit Judge.*

The principal issues in this appeal are whether the jury, charged with determining damages owed by the United States to the Southeastern Pennsylvania Synod of the Lutheran Church in America ("Synod") for land taken under the power of eminent domain, was properly instructed in the law and whether the jury was sufficiently misled by a remark made by counsel for the Government to require a new trial. We hold that the combination of inadequate instructions by the trial judge and a misstatement of law made by the Government during its closing argument require a new trial.

I.

The trial in this case arose from a condemnation by the Government, as part of the Tocks Island Recreational Project, of three summer camps located on the Delaware River and owned and operated on a not-for-profit basis by the Synod. Prior to trial, the Synod sought a ruling that the proper measure of damages for just compensation under the Fifth Amendment is the cost of constructing substitute facilities to replace the camps, rather than the fair market value of the camps. Noting that the substitute facilities doctrine had only been applied in cases in which the condemnee was a governmental entity, the district court ruled that the substitute facilities doctrine was inapplicable. In an interlocutory appeal under 28 U.S.C. § 1292(b), this court reversed, holding that the substitute facilities measure of fair compensation is available to private owners of non-profit facilities if there is no ready market for the facilities and if the facilities are "reasonably necessary to public welfare." *United States v. 564.54 Acres of Land*, 506 F.2d 796, 800 (3d Cir. 1974). This court did not decide whether the property in this case met the test for the application of the substitute facilities doctrine, but left that issue for the determination of the district court.

Trial was divided into two phases. The first phase considered the issue of whether the substitute facilities doctrine applied to the condemned camps. Via a special interrogatory, the jury found that it did not apply. The second phase consisted of a damage determination using the fair market value test. The jury returned a verdict awarding $740,000 in damages. The Synod moved for a new trial on the phase one issue. Shortly thereafter, the trial judge died, and the judge to whom the case was reassigned denied the motion. This appeal followed.

The record establishes that the three pieces of property, acquired between 1927 and 1947, were treated as one for administrative purposes and that the camps were operated on a not-for-monetary-profit basis by the Eastern Pennsylvania Lutheran Camp Corporation, a Pennsylvania non-profit corporation. The camps lost money each year and were subsidized by gifts from members of the Lutheran Church. The camps provided activities such as water and land sports, nature appreciation activities, and arts and crafts. They were open to children without any restriction as to race or religion. Scholarships to the camps were given to underprivileged and emotionally disturbed children. Campers included children from inner-city Philadelphia, some of whom were provided an opportunity to go to camp as a means of alleviating the "gang" problems in the inner-city. A number of charitable organizations paid the tuition of children who could not otherwise go to camp. These children included Protestants, Catholics, Jews, and children expressing no religious affiliation. These organizations could not afford to send children to camps operated for a profit. Additionally, many campers were not economically deprived and did not receive financial assistance.

Evidence was introduced by the Synod to show that during the period when the Synod knew that the camps were going to be condemned, no camp was on the market, nor was any combination of camps simultaneously on the market which would have adequately replaced the condemned camps. Consequently, the Synod felt the only way to continue the camping operation was to purchase land and construct new camping facilities. The Synod's expert witness testified that a conservative estimate was that it would cost approximately $4,361,000 to replace the camps by constructing new facilities. Apparently, the reason for the great disparity between this figure and the $740,000 fair market value of the camps is attributable to the fact that the condemned camps were allowed to operate in noncompliance with state and federal housing and environmental legislation under grandfather clauses, but a newly constructed camp would require elaborate facilities to comply with this legislation. *564.54 Acres I* at 798.

Although the Government did not acquire the camps until 1970, the publicity regarding the Tocks Island Recreational Area caused the Synod to anticipate the condemnation, and in 1964 the Synod purchased land in the Poconos for construction of a replacement camp.

II.

At the conclusion of phase one of the trial, the court submitted to the jury, together with a lengthy charge, the following interrogatory: "Under the principles I have given you, does the doctrine of substitute facilities apply?" The crucial issue in this appeal, as we see it, is whether this interrogatory was submitted to the jury in a confusing and misleading manner in light of the charge to the jury and remarks made by counsel for the Government in summation.

The Synod specifically argues that the court should not have submitted an omnibus question to the jury, but rather should have submitted each of the

elements of the substitute facilities doctrine to the jury in a separate question. Our discussion of these elements *infra* shows that, due to their complexity, this position has great merit, and, in light of our discussion of the elements, the district court may wish to adopt this approach on remand. However, we decline to consider this specific contention, which is part of the larger question of whether the special interrogatory was confusing or misleading, as a ground for reversal. The Synod did not object to the form of the interrogatory at trial, although given ample opportunity to do so, and where a party does not object to the wording of a written interrogatory at trial we will not review it on appeal. *Frankel v. Burke's Excavating, Inc.*, 397 F.2d 167, 170 (3d Cir.1968). *See also Kirkendoll v. Neustrom*, 379 F.2d 694, 698 (10th Cir. 1967); *Wyoming Construction Co. v. Western Casualty and Surety Co.*, 275 F.2d 97, 104 (10th Cir.), *cert. denied*, 362 U.S. 976 (1960).[1]

A determination of whether the jury was confused or misled in answering the interrogatory requires us to examine in detail the principles established by *564.54 Acres I* and its progeny and determine whether the charge given to the jury and the alleged prejudicial misstatement of law made by the Government comport with those principles. This will require us to review the jury instructions, to which the Synod did not object in the district court. Although generally jury instructions will not be reviewed on appeal if they were not objected to at trial,[2] we have the discretion to review instructions *sua sponte* if the error is fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on the fundamental question and our failure to consider the error would result in a miscarriage of justice.[3] Though this discretionary

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[1] The Synod also argues for the first time on appeal that it was error to submit the special interrogatory to the jury because it poses a question of law to be answered by the court. At trial, the Government argued that this question was one for the court, but the Synod did not join this argument nor object when the court ruled that the interrogatory would be submitted to the jury. Apparently, the Synod preferred to have the jury answer this question, but now, having lost, argues that the court should have answered it. Since the Synod did not challenge submission of the question of the applicability of the substitute facilities doctrine to the jury in the district court, we decline to address this contention on appeal. *See Kirkendoll, supra* at 698; *Wyoming Construction Co., supra* at 104.

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[2] F.R. Civ. P. 51 provides in pertinent part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[3] This circuit first recognized an exception to F.R. Civ. P. 51, note 2, *supra*, in *Callwood v. Callwood*, 233 F.2d 784, 788 (3d Cir. 1956), which stated that the court could review a jury charge not objected to if the error in the charge was fundamental and highly prejudicial. In our frequent application and reaffirmance of this principal, we have stated it a number of different ways. In *Rataj v. Lincoln National Life Ins. Co.*, 378 F.2d 209, 212 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967), we stated that we would engage in such a review because the erroneous instruction related to a critical issue and it did not affirmatively appear from the whole record that it was not prejudicial. The charge was reviewed in *Wilson v. American Chain and Cable Co.*, 364 F.2d 558, 562 (3d Cir. 1966), because "[t]he jury was without adequate guidance on [a] fundamental question .... A verdict so arrived at is one ungoverned by the legal principles which determine the dispute between the parties and therefore may not be sustained as the ultimate product of the judicial process." *Pritchard v. Leggett & Meyers Tobacco Co.*, 350 F.2d 479, 486 (3d Cir. 1965), *cert. denied*, 386 U.S. 1009 (1967), held that "[w]here it is apparent on the face of the record that a miscarriage of justice may have resulted from counsel's failure to properly protect the interest of his client by timely objection, the error must be noticed and rectified." In *Trent v. Atlantic City Electric Co.*, 334 F.2d 847, 859 (3d Cir. 1964), we stated that "[t]his court has on occasion reversed sua

(footnote continued)

power should be exercised sparingly, *Trent v. Atlantic City Electric Co.*, 334 F.2d 847, 859 (3d Cir. 1964); *Mazer v. Lipschutz*, 327 F.2d 42, 52 (3d Cir. 1964),. we think it is exercised appropriately in this case. As the following discussion demonstrates, "[t]he jury was without adequate guidance on [a] fundamental question .... " *Wilson v. American Chain and Cable Co.*, 364 F.2d 558, 562 (3d Cir. 1966). Failure to rectify this error could result in a miscarriage of justice because it could mean that the Synod would receive several million dollars less in compensation than that to which it is entitled. We turn now to an examination of the principles of *564.54 Acres I*, the charge, and the remarks made in the Government's closing argument.

III.

In *564.45 Acres I* we held that the substitute facilities doctrine applied to privately owned property if three conditions were met: (1) the property must be operated on a not-for-profit basis; (2) there must be no ready market for the particular type of property; and (3) the property, or facilities, must be "reasonably necessary to the public welfare." *id.* at

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(footnote continued)

sponte on the basis of plain or fundamental error respecting the charge." In *McNello v. John B. Kelly, Inc.*, 283 F.2d 96, 102 (3d Cir. 1960), we reversed on the basis of instructions not objected to because the instructions were so inadequate that they were "tantamount to no instructions at all." *Accord*, *Mazur v. Lipschutz*, 327 F.2d 42, 52 (3d Cir. 1964) ("an appellate court may in its discretion, disregard Rule 51 when the error claimed is plain and may result in a miscarriage of justice . . . ."); *Leposki v. Raiway Express Agency, Inc.*, 297 F.2d 849, 850 n.1 (3d Cir. 1962).

796. Each of these conditions has complexities and we will analyze each of them in turn.

A. Not-for-Profit Basis

The dispute at the trial over this element of the substitute facilities test concerned whether "not-for-profit" refers to monetary profit or to any type of profit. Specifically, the dispute is whether operating facilities for "spiritual profit" precludes application of the substitute facilities doctrine.

During closing argument, counsel for the Government made the following statements:

> "On the question of not-for-profit, we concede they are a religious and charitable organization which was operating on a not-for-monetary profit. No question about it. But, is that the only kind of profit? Think about it. They were putting in operation a camping program which was for the betterment of their religious teachings. Is that not a profit for a religion? [The Synod's counsel] said, 'And if by chance some kid might be converted.... Isn't that what they are there for? Isn't that their mission?' So, maybe they were operating not for a monetary profit but maybe for a spiritual profit. [140a]
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> * * *
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> "He [Pastor Gulliford] said he visited Camp William Penn. I don't know if you recall that. It was just a short part of his testimony. He said that's a city-run camp. He said it handled roughly the same number of children. But he said the difference was, and here's your tip-off why this is not to be considered as a not-for-profit operation; he said, 'They had different goals.' Sure they did. They were there to take care of the children from the ghetto areas, period. They weren't there to promote their religion or any religious teachings, or doctrine." [144a-45a]

The Synod argues that this is a misstatement of the law, and that these statements misled the jury as to the proper test for application of the substitute facilities measure. Of course, a misstatement of law which is prejudicial and not cured can be grounds for a mistrial. *See Hockaday v. Red Line, Inc.*, 174 F.2d 154, 156 (D.C. Cir. 1949). The Government, however, makes three arguments in response. It argues, first, that this is not a misstatement of law; second, that even if it were, it was cured by the judge; and, third, that the Synod is precluded from raising this issue because it failed to make a timely objection. We reject all three of these arguments.

First, it is clear that the court in *564.54 Acres I* was referring to monetary profit. In the context of a discussion of the camps' not-for-profit operation, the court noted that the Synod claimed that the camps were operated at a loss. Surely this means that the camps operated at a monetary loss, not a spiritual loss, and therefore the court also must have been referring to monetary, not spiritual, profits. Moreover, the court noted that if property has no marketplace, the substitute facilities measure is applicable to non-profit facilities and the present value of capitalized future earnings measure is applicable to profit-making facilities. *Id.* at 799. Because spiritual earnings cannot be capitalized, "profit" in the context of this discussion means monetary profit. This is the only reasonable interpretation of "not-for-profit," for to hold that a private owner cannot qualify for application of the substitute facilities doctrine if he receives any type of profit, no matter how intangible or ephemeral, from his property would render the doctrine inapplicable to private owners in every instance. Every charitable organization receives some type of profit from its public works in the form of the feeling of achievement and satisfaction the contributors derive from their good work or the enhancement of the image of the organization and its members in the eyes of the community.[4]

We conclude that the remarks by counsel for the Government constituted a clear misstatement of law.

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[4] Nothing we have said should be taken to imply that a facility will qualify for the substitute facilities doctrine if it is run on a non-profit basis for other than the purpose of charity or for the purpose of providing a service at a low cost; for example, if it does not make a profit because of mismanagement or inefficient operation or because certain employees are paid high salaries. In the present case, the Synod attempted to show that the potential to make profits was transferred to the community as a community benefit, and our discussion is limited to this factual situation. One rationale for the substitute facilities measure is to indemnify not only the owner of the condemned facilities, but those who have an interest in the continuing existence of the facilities, in this case, according to the Synod, the general public. *See United States v. Certain Property in Borough of Manhattan*, 403 F.2d 800, 804 (2d Cir. 1968); Note, Cost of Substitute Facilities As A Measure of Just Compensation When There is A Private Condemnee, 1975 Duke L.J. 1133, 1149. *See also 564.54 Acres I* at 800: "[T]he owner of a facility devoted to a non-profit, public use has a proprietary as well as a community interest in it . . . ."

Aside from being a misstatement of law, one of these remarks was improper for a second reason. The second statement quoted above clearly implies that the purpose of the camps was to promote the Lutheran religion, teachings and doctrine. This may have influenced the jurors to find that the substitute facilities measure did not apply because they did not want the taxpayers' funds to be used to convert campers to the Lutheran religion. There is absolutely no evidence in the record to indicate that the Synod used the camps to proselytize. Therefore, this remark was highly inaccurate, as well as prejudicial.

We do not think the trial judge cured this misstatement of law and the resulting prejudice. Counsel for the Synod objected to these remarks and the court overruled the objection without comment (N.T. 784), apparently thinking either that this was not a misstatement of law or that it was not sufficiently prejudicial to require curative instruction. In the charge, the trial judge did tell the jury "to follow the law as stated in the instructions of the Court" (N.T. 788) and that 'statements of counsel are not evidence" (N.T. 795). The court, however, never told the jury that the statements of counsel are not law, never told the jury to disregard statements of law by counsel, and never singled out the offending remarks as being erroneous. Because of the inaccurate and highly prejudicial nature of these remarks, we do not think these general instructions cured the damage. Moreover, the only times the charge referred to the non-profit element of the substitute facilities test the court did not specify not-for-monetary-profit (N.T. 798, 802). It would have been an easy matter for the district court to expressly state that the Government's remark was a misstatement of law. The general remarks the dissent finds to be curative fall far short of the type of explicit statement that would have eliminated any possibility of prejudice. The fact that the district court overruled the Synod's objection to this remark (N.T. 784) indicates that the court did not intend to cure the effect of this error.

We think the objection to the improper remarks was timely. The Synod did not object to the remarks at the time they were made nor attempt to rebut them in its closing argument. Rather, counsel objected in chambers after the trial had recessed for the day. Relying on two cases from other circuit courts of appeals, *Sanden v. Mayo Clinic*, 495 F.2d 221 (8th Cir. 1974), and *Hyman v. Life Insurance Company of North America*, 481 F.2d 441 (5th Cir. 1973), which held that objection is waived if counsel does not either object or move for a mistrial at the time remarks are made, the district court held that the Synod had waived objection. Although the better practice is to object at the time remarks are made, the rule of *Sanden* and *Hyman* has not been adopted in this circuit. Rather, the rule in this circuit is that, to be reviewable, an error must be called to the attention of the trial court so that the trial court has an opportunity to rule on the matter and correct any prejudicial errors. *Shepler v. Crucible Fuel Co.*, 140 F.2d 371 (3d Cir. 1944). On this standard, the

objection was timely, since the trial judge could have corrected any impropriety in supplemental instructions to the jury the next morning.

We note finally that the evidence established that the camps were run on a not-for-monetary-profit basis and that the Government conceded this. Accordingly, the jury could not have properly found that this element of the substitute facilities test was not met, and the court should have ruled that it was met as a matter of law.

B. No Ready Market

The jury instructions on the no ready market condition were substantially correct at times and somewhat confusing at one point. Taken alone, therefore, the instructions on this point would not be grounds for reversal. However, since the parties disagree on the meaning of the no ready market condition, and since a clarification of the meaning of that condition by this court will enable the district court on remand to instruct the jury more clearly and succinctly, a discussion of this point is necessary. Although there was no fundamental error in the instructions on this point, any departure from a clear, succinct statement would tend to blur the confusing task the jury faced in answering a complex, multifacted question.

The Synod interprets the condition that there be no ready market to mean that the facility must be unique in the sense that it cannot be replaced in the marketplace at a cost roughly equivalent to its fair market value. The Government interprets the condition to mean that no market value can be established because the facility cannot be sold in the marketplace. Of course, if there is no market, the facilities can be neither bought nor sold. When the substitute facilities doctrine was first developed, it was in the context of facilities such as highways, which have no market value in this economic sense, *see, e.g., Forth Worth v. United States*, 188 F.2d 217 (5th Cir. 1951); *United States v. Los Angeles County*, 163 F.2d 125 (9th Cir. 1947). Highways are never bought or sold on the market. However, when the Court of Appeals for the Second Circuit applied the substitute facilities doctrine to such facilities as a gymnasium, *United States v. Certain Property*, 403 F.2d 800 (2d Cir. 1968), and we applied the doctrine to camps, it became clear that the concept of a ready market took on a different meaning because camps and gymnasia are bought and sold privately and have market values.

It is important to distinguish between the market for the underlying property adaptable to various uses and the market for the existing facilities. Although a camp owner can readily sell camp property either for use as a camp or because he can obtain a market price determined by alternative uses of the property, a displaced camp owner may not be able to purchase a comparable existing facility because, in a given area, there may be a limited number of camps whose facilities may vary substantially. Thus, a camp at certain times and under certain economic conditions may be sufficiently unique to be irreplaceable in

the market,[5] requiring the displaced camp owner to purchase property and construct facilities equivalent to those taken. *Cf. Newton Girl Scout Council v. Massachusetts Turnpike Authority*, 335 Mass. 189, ____, 138 N.E.2d 769, 775 (1956). If this is so, the "no ready market" condition is met.

In *564.54 Acres I*, at 799-800, the court stated:

> "The basic principle underlying the constitutional requirement of 'just compensation' is one of indemnity. The condemnee 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but he is entitled to no more.' Olson v. United States, 292 U.S. 246, 255, 54 S. Ct. 704, 708, 78 L. Ed. 1236 (1934).
>
> "If the government condemns property for which there is a ready market (commodities are a classic example) payment of the fair market value is complete indemnity since, whatever its intended use, the condemnee can *readily replace it in the marketplace.*

* * *

"... Indeed, the Second Circuit in the United States v. Certain Property, 403 F.2d 800, 803 (2d Cir. 1968), and the Ninth Circuit in California v. United States, 395 F.2d 261, 266 (9th Cir. 1968) have made it clear that *even in those comparatively rare instances where there is a market value for the community facility taken* (for example a possible sale of a public building for private use) the government's duty to indemnify is to provide the cost of a more expensive public substitute facility.... Simply stated this method insures that sufficient damages will be awarded to finance a replacement for the condemned facility."

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[5] *564.54 Acres I* suggest that the facilities must be unique for the substitute facilities measure to apply. This is not a separate condition but rather part of the "no ready market" condition.

(Footnote omitted, emphasis supplied.)

This language makes clear that regardless of whether the Synod could have sold the camps, and regardless of whether the camps had fair market value, this condition of the substitute facilities doctrine is met if the Synod could not have replaced the camps' facilities in the marketplace for a cost roughly equivalent to the fair market value of the camps.[6] Therefore, a facility will be deemed replaceable in the marketplace if the owner, exercising reasonable diligence,[7] could have purchased a functionally equivalent replacement at a cost roughly equal to the fair market

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[6] *See also United States v. Certain Land in Borough of Brooklyn*, 346 F.2d 690, 694 (2d Cir. 1965):

> ... strict application of the market value rule of compensation will often be abandoned when the nature of the property or its uses produce a wide discrepancy between the value of the property to the owner and the price at which it could be sold to anyone else."

Accord, United States v. Certain Property in Borough of Manhattan, 403 F.2d 800, 802 (2d Cir. 1968).

[7] To show that reasonable diligence was exercised, it may not be enough for the condemnee to show that no camps were advertised openly during the relevant time period if there is evidence that camps were being bought and sold or that unadvertised camps could have been purchased if inquiry had been made. In attempting to purchase facilities, however, the directors of a charitable or religious organization are not necessarily expected to exercise the skill and business acumen of a profit-motivated bussinessman. Whether the Synod exercised reasonable diligence is a question of fact to be decided on remand.

value of the taken facility[8] during a reasonable time after notice of condemnation.[9]

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[8] It may be possible to purchase functionally equivalent facilities for a cost far in excess of the fair market value of the condemned facilities. For example, the only functionally equivalent camps in the area may be in the path of industrial or residential development, and therefore camping may not be the highest and best use of the property. In this situation, the substitute facilities doctrine is applicable, but if it would cost less to purchase the equivalent camp than to construct a new one, the cost of substitute facilities should be based on the purchase price of this camp if the condemnee could have purchased it exercising reasonable diligence.

[9] As noted above, we do not find fundamental error with the jury instructions on this point; however, the jury instructions were not completely clear in explaining the proper meaning of "no ready market." Although the court correctly told the jury that it must find that there was no ready market for the facilities if the Synod could not replace the camps (N.T. 802) and that "if the fair market value of the condemned property is substantially less than the cost of constructing functionally equivalent substitute facilities, then the substitute facilities doctrine is a proper method of valuation" (N.T. 797), the court also stated that if the jury found that the camps had market value in the usual sense, the substitute facilities doctrine would not apply and the property should be treated like that of any other private condemnee. The court stated:

> "The general rule is that just compensation is to be measured by the fair market value of the interest taken. That is the price which would have been agreed upon in the open market between a willing buyer and a willing seller. Fair market value is the normal and useful standard of just compensation. *There are, however, instances where* because the property taken either is public property of a state or a municipality or is a rarely transferred speciality, where *no market value in the usual sense exists.* If you find this is the case in this proceeding, then the substitute doctrine will apply. *If you do not find this to be the case, then the property should be treated like that of any other private condemnee.*" (N.T. 800-01; emphasis supplied.)

The italicized language is clearly inconsistent with the language of *564.54 Acres I* quoted above. The court attempted to correct this error by stating:

> "Members of the jury, at one point in my Charge, I told you as follows: 'There are, however, instances where because the property taken either is a public property of a state or of a municipality or is a rarely transferred speciality no market value in the usual sense exists. If you find that this is the case in this proceeding, then the

(footnote continued)

C. "Reasonably Necessary"

To qualify for the substitute facilities measure the facility must be "reasonably necessary to public welfare." *564.54 Acres I* at 796. "Reasonable necessity" is an elusive concept, and consequently this is a difficult element of the substitute facilities doctrine to apply. The Government interprets "reasonable necessity" to mean that the facility must be necessary to the community in a strict sense, in the sense that it is indispensable and the community cannot get along without it. Brief for appellee at 12, 25. The Synod, on the other hand, equates "reasonable necessity" with community benefit. Brief for appellant at 32. We think the Synod's interpretation comes closer to capturing the correct meaning of "reasonably necessary."

In some early cases, courts required that for replacement facilities to be necessary, the governmental owner must be compelled by law to replace them. *E.g. United States v. Board of Education of County of Mineral*, 253 F.2d 760, 764 (4th Cir. 1958); *Clarksville v. United States*, 198 F.2d 238, 243 (4th Cir. 1952); *United States v. Wheeler Tp.*, 66 F.2d 977, 984 (8th Cir. 1933). The court in *564.54 Acres I* expressly rejected the legal necessity test. Most courts have adopted a "factual necessity" test holding that, in some sense, the facilities must be necessary in fact. *E.g. United States v. 3,727.91 Acres of Land*, No. 76-1772, slip op. at 2, n.2 (8th Cir., Sept. 30, 1977); *United States v. Streets, Alleys & Public Ways, Etc.*, 531 F.2d 882, 886 (8th Cir. 1976); *United States v. Certain Property in Borough of Manhattan, supra* at 803-04; *United States v. Certain Land in Borough of Brooklyn, supra* at 695; *Washington v. United States*, 188 F.2d 217, 222 (5th Cir. 1951); *California v. United States*, 169 F.2d 914, 924 (9th Cir. 1948); *United States v. Arkansas*, 164 F.2d 943, 945 (8th Cir. 1947); *United States v. Los Angeles County*, 163 F.2d 124, 125 (9th Cir. 1947); *United States v. Des Moines County*, 148 F.2d 448, 449 (8th Cir. 1945). An examination of the facts of many of those cases which reject the application of the substitute facilities are not factually necessary shows that "factually necessary" may not mean necessity in a strict or absolute sense. In a number of those cases, constructing substitute facilities would have provided virtually no benefit, which was deprived by condemnation, to the community, either because the condemned facility was unused prior to condemnation,[10] or because the condemnation

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(footnote continued)

substitute facility doctrine will apply. If you do not find this to be the case, then the property taken should be treated like that of any other private condemnee.'

"I will ask you to disregard that and consider my other instruction because the doctrine can apply to something which is not public. But the factors have to be present which I have given you." (N.T. 808-09)

This curative instruction only cures the error created by the implication in the earlier instruction that the substitute facilities doctrine applies only to public property. It leaves open the inference that the substitute facilities doctrine applies only where there is no market value in the usual sense. Therefore, the jury may have incorrectly thought that, for the substitute facilities doctrine to apply, the facilities must have no market value.

[10] For example, in *California v. United States, supra*, the "streets" taken were actually proposed streets 20 feet below water in the San Francisco Bay.

eliminated any need for the facility,[11] or because the condemnor constructed a functionally equivalent facility to serve the purpose the condemned facility had been serving.[12] Therefore, interpreting "necessary" to mean "beneficial" is consistent with the results of these cases. Futhermore, at least one early circuit court of appeals decision adhering to the factual necessity text expressly rejected a strict interpretation of "necessity." *Fort Worth v. United States, supra* at 222.[13] We also note that commentators have

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[11] For example, in *Woodville v. United States*, 152 F.2d 735 (10th Cir. 1946), there was no benefit to be gained by constructing new roads because the entire town the roads served had been taken by condemnation and flooded. Similarly, in *United States v. 3,727.91 Acres of Land, supra*, the condemnee would have served no purpose by constructing new levees and drainage ditches to control flooding because the Government took the land on which flooding could be controlled. In *United States v. Streets, Alleys & Public Ways, Etc., supra*, new streets and alleys would have provided no benefit because the population of the town had decreased to 30 under threat of condemnation for a reservoir, and new streets constructed by the condemnor were adequate for that number of people. In *Washington v. United States, supra*, construction a substitute road would have served no purpose because some of the communities served by the road were being flooded and a new road constructed by the condemnor adequately served the other communities. In arguing that these cases are inconsistent with the community benefit interpretation of "reasonably necessary" (dissenting opinion, note 8), the dissent fails to distinguish between benefit to a few individuals and benefit to the community. It does not follow from the fact that substitute facilities would have benefited a few people in these cases that substitute facilities would have been sufficiently valuable or important to provide a community benefit. We realized there may be difficulties in defining "community" in some cases, but this case does not present that problem.

[12] See *United States v. Streets, Alleys & Public Ways, Etc.* and *Washington v. United States*, both discussed in note 11, *supra*.

[13] In rejecting the Government's strict interpretation of "necessary," the court stated:

> "[I]t will not at all do to say that in determining the cost of providing any necessary substitutes, an award in condemnation may be denied because there are already in existence other available routes which will in some fashion handle the traffic diverted by the condemnation.... In any proper view of the

(footnote continued)

supported rejection of a strict interpretation of necessity. Note, Duke L.J., *supra* note 4; Note, Substitute Facility Measure of Just Compensation Is Available to Private Owners of Nonprofit Community Facilities in Appropriate Cases, 6 Seton Hall L. Rev. 711 (1975); Note, Just Compensation and the Public Condemnee, 75 Yale L.J. 1053 (1966).

Although it is not clear that there ever was a generally accepted rule that substitute facilities must be strictly or absolutely necessary, if there were such a rule, *564.54 Acres I* and other cases have abandoned that rule by qualifying "necessary" with "reasonably." *Certain Property in Borough of Manhattan, supra; Certain Land in Borough of Brooklyn, supra. See 3,727.91 Acres of Land, supra; Streets, Alleys & Public Ways, Etc., supra; Washington v. United States, supra.* Moreover, in holding that the substitute facilities measure can apply to such facilities as camps, playgrounds and gymnasia, these courts established that "reasonably necessary" cannot possibly mean "absolutely necessary" or "indispensable" because no one camp, playground or gymnasium could ever be absolutely necessary or indispensable to a community. Therefore, a court that held that the substitute facilities doctrine is applicable to this type of facility, but only if the facility is absolutely neces-

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(footnote continued)

> requirements of just compensation, the substitute 'necessary' is that necessary to readjust its street and highway system to serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such system would have provided had the facility in question not been condemned, so far as this is reasonable and practical."

sary, would be giving with one hand and taking away with the other. Additionally, the entire expression used by the court in *564.54 Acres I*, "reasonably necessary to public welfare," also includes the elusive concept of public welfare. This suggests that the facilities need not be "reasonably necessary" to the existence of the community, but only to the well-being of the members of the community. They need not be so essential that they are required to make the community meet minimal standards, rather they need only make the community a better community. Read against the background of the history and development of the "necessity" requirement, the facts of the cases applying both the "factually necessary" test and the "reasonably necessary" test, and the ordinary language meaning of the expression "reasonably necessary to public welfare",[14] the mean-

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[14] The expression "reasonably necessary" is not commonly used in ordinary language, but rather appears to be an expression framed by the courts. Consequently, it must derive its meaning primarily from the facts of the cases in which it has been applied and the cases from which it developed. However, insofar as it is proper to qualify the word "necessary" with the word "reasonably" in ordinary language, the expression "reasonably necessary" seems somewhat analogous to an expression like "reasonably good," meaning not entirely good but somewhat good. Therefore, in ordinary language, "reasonably necessary" must mean " not entitrely necessary, but somewhat necessary" to the welfare of the community. This is roughly equivalent to "beneficial to the community" and is consistent with our analysis of "reasonably necessary" as a legal term of art. Furthermore, as noted above, the facility must be "reasonably necessary to public welfare" and public welfare connotes community benefit. The dissent misinterprets our discussion in this footnote. We do not equate the expression "reasonably necessary" with the expression "reasonably good." We think that because the expression "reasonably necessary" is not commonly used in ordinary parlance, comparing it with a common expression like "reasonably good" helps to clarify its meaning. Of course, as the dissent notes, the words "reasonable" and "necessary" are used in ordinary language every day. The expression "reasonably necessary," however, is not so common to laymen, some of whom are vitally interested in the principle in this case, and, as noted, appears to be an expression framed by the courts.

ing of this element of the substitute facilities doctrine becomes clearer. There are two aspects to "reasonable necessity." First, for a facility to be "reasonably necessary" it must provide a benefit to the community or be rationally related to the public welfare.[15] Of course, to say that a facility provides a benefit to the community is not to say that it serves everyone in the community. For example, a small neighborhood park that serves only the people living within walking distance from it may provide a benefit to the community. In this case, the Synod attempted to show that the camps helped alleviate the "gang" problem in inner-city Philadelphia. If the camps did help reduce such juvenile crime, then they provide a benefit to the entire community of Eastern Pennsylvania, not just to the campers.

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[15] *See* Note, Duke L.J., *supra* note 4 at 1141. The dissent disagrees with this interpretation of the "reasonably necessary" test because [u]nder the proposed standard, governmental condemnors would be subject to the whims and caprices or private nonprofit swimming clubs, ice-skating clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations who might discern need for their facilities but which the community might find frivolous." Dissenting opinion, note 9. This point is reiterated in the dissenting opinion, note 11. We do not think this result would follow from our decision. It is not the whim of the owner of a nonprofit facility that will determine whether the Government will have to replace the facility. This will be determined by the jury. Under our standard, a trial judge would be free to instruct a jury that it might find that any facility not open to the public does not meet the community benefit or public welfare standard. Therefore, there is no likelihood that the Government would have to replace private clubs under our standard. Secondly, since the jury is the conscience of the community, we must assume that any facility a jury finds beneficial to the community or rationally related to public welfare would not be found "frivolous" by the community. In short, with regard to both private clubs and frivolous facilities, the jury acts as a safeguard on the whims of the owners. There is another reason why we think our broad interpretation of "reasonably necessary" is preferable to the dissent's narrow interpretation. Under the dissent's standard not only would swimming pools, skating rinks, and tennis courts be excluded, but such clearly beneficial and educational facilities as art museums and zoos would also be excluded. Juries might find these faciliteis to be quite beneficial to the community, yet not reasonably necessary to the community, as many cities have no zoo and no significant art collections. Rather than framing a narrow standard that would jeopardize the continuation of such valuable facilities, we prefer to interpret the "reasonably necessary" standard broadly so that a jury can assure that a valuable community facility is replaced when it has been taken by the Government, whether that facility be as humble as a neighborhood skating rink or as stately as the Philadelphia Museum of Art.

Secondly, for a facility to meet the "reasonably necessary" test, the condemnor must not have eliminated the need or purpose which the condemned facility served. For example, if the condemnor has provided a functionally equivalent replacement facility, or if the condemnor renders a replacement facility useless by flooding the town it would have served, the condemnor has eliminated the need or purpose the condemned facility served, and it is not "reasonably necessary" to replace it. To summarize, for a facility to be "reasonably necessary to public welfare," it must provide a benefit to the community that will not be as fully provided after the facility is taken.

Again, the jury instruction on this point did not accurately reflect our interpretation of the law. Although at one point the instruction regarding "reasonable necessity" referred to "fulfilling a community need or purpose" (N.T. 798), the instructions never equated "reasonably necessary" with community benefit. More seriously, the instructions seem to have emphasized the strict sense of necessity which we have rejected here. For example, they stated that for the "reasonably necessary" test to be met, the Synod must have a duty to replace the facility and

the duty need not be legally compelled but may arise from necessity (N.T. 801). Moreover, the words "need" and "necessary" were used throughout the charge, but "benefit" was never used.[16] Therefore, the charge on the "reasonably necessary" issue was confusing and misleading.

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[16] The language of the charge relating to the "reasonably necessary" condition is set out below with emphasis supplied:

> "You may find that the substitute facilities doctrine applies if the facilities were . . . fulfilling a community need or purpose. [N.T. 798]
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> . . .
>
> "These two valuation doctrines rest upon the theory that if Synod is under a *duty* to continue operating the taken facility, it is entitled to sufficient recompense to permit it to continue but *if the Synod is not under such a duty, the property should be treated like that of a private condemnee. . . .*
>
> "In determining which doctrine is to apply, the determination rests fundamentally on the existence or nonexistence of the community's *need* for the property condemned. This will be your first and fundamental question. The *duty to replace* need not be legally compelled. It *may arise from necessity.*
>
> "Therefore, you must decide whether the Synod has shown the condemned facility to be reasonably necessary. You should note the fact that the Synod may have drawn up plans for replacing the appropriate facilities, that the Synod has committed itself to sue any award to constrict a replacement, or the fact that it acquired a site for a substitute facility; none of these is conclusive evidence that the substitute facility is *needed.*
>
> "You should also note that not every condemned facility *needs* to be replaced. Substitution may be unreasonable or unnecessary. The *public need* may no longer exist or adequate alternative facilities may be available. [N.T. 801-02]
>
> . . .
>
> "If you find that the Synod has proved a *need* to replace the condemned camps, the substitute facilities doctrine requires that the Synod be awarded a sum of money which would allow it to replace the camps functionally equivalent to the condemned facilities." [N.T. 803]

IV.

In part III above we established that three conditions must be met for the substitute facilities measure to apply to privately owned property. With the caveat that a summary cannot articulate the complexities discussed above, we summarize the three conditions as follows: (1) the condemned facility must have been operated on a not-for-monetary-profit basis; (2) the owner, exercising reasonable diligence, must have been unable to purchase a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility; (3) the facility must have provided a benefit to the community that will not be as fully provided after the facility is taken.[17] Therefore, on remand for a new trial, whether these three conditions are met must be determined.

The order of the district court denying the Synod's motion for a new trial will be reversed and the case remanded for a new trial in accordance with this opinion.

STERN,* (concurring)

There is much in Judge Rosenn's dissent with which I agree, but I am compelled to vote for reversal because we are bound by *564.54 Acres I.* I fully concur in the implication in Judge Rosenn's dissent that the standards announced in this Court's interlocutory opinion were impossible for the district court to apply, and I am filled with admiration for the late, distinguished trial judge who handled this matter. If the question before this Court were whether the district judge did a good job or a bad one, I would vote for affirmance. Judge Sheridan did the very best he could given the inherent difficulties of this case and the ambiguous directions he was given in this Court's interlocutory opinion. But the trial judge is not a party to the lawsuit and the object of an appeal is not to vindicate him, but to insure that the rights of the litigating parties have been fairly adjudicated. Thus, while I reach a different conclusion than does Judge Rosenn, my reasons for doing so are largely in accord with his view that it was impossible for the trial judge and jury to apply the vague standards forced on them by the interlocutory opinion.

It is regrettable that the parties will have to return to the district court a third time, but no other result is possible under the rules of the United States Court of Appeals for the Third Circuit. Only one member of this panel has authority to vote for rehearing *en banc* and without such a rehearing, *564.54 Acres I* is the rule of the Circuit. Under the rule of the case, neither the government nor the Synod received a fair trial, and it is difficult to see how they could have received one.

As Judge Rosenn points out, the definitions of the elements required to establish entitlement to compensation measured by the cost of substitute

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[17] In this formulation of the third condition, we have consciously avoided using the expression "reasonably necessary." Because this expression, not commonly used in ordinary language, could easily be misinterpreted by a jury, we think avoiding it is desirable.

* Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

facilities are so blurry that no one knows what they are. I also think that Judge Van Dusen has done a masterful job of cleaning up the debris.

I agree with Judge Van Dusen that the instructions given to the jury were confusing, contradictory, and, in some measure, erroneous. I have no doubt that there was a faithful attempt to apply the standards set down in the interlocutory opinion, but those standards were themselves confusing and contradictory where they existed at all. And I believe that the errors that were committed were so fundamental that the litigants' failure to object will not bar review.

The *564.54 Acres I* opinion states variously that the cost of substitute facilities may be the measure of compensation (1) where there exists no ready market; (2) where the condemned facilities have no market value; (3) where, although there is a market value, it is not commensurate with the government's obligation to indemnify; and (4) where the facilities are single purpose and/or unique. It is evident upon reading the trial court's instructions to the jury that the melding of these distinct concepts leads to nothing but confusion.

No greater clarity exists with respect to the requirement that the condemned facility, or, more precisely, a replacement for the condemned facility be "reasonably necessary." To my mind, it is not at all clear that the interlocutory opinion even addressed this issue. The interlocutory opinion begins with broad reference to facilities operated "for a religious or charitable purpose." It uses, on numerous occasions, the language "community use". At only one point does it arguably narrow the application of the doctrine it espouses by approval of the approach of the Second Circuit "which recognizes that the decision to replace a facility may involve discretionary determinations as to community need, and that fair compensation for a structure reasonably necessary to public welfare means 'compensation . . . measured not in terms of "value" but by the loss to the community occasioned by the condemnation.' " This section of the opinion serves to refute the government's position on the interlocutory appeal that only a governmental entity under a *legal* obligation to replace the condemned facility should be entitled to the substitute facilities measure of just compnsation. The interlocutory opinion thus rejects the legal necessity test but I do not think that it goes so far as to adopt the Second Circuit's theory of "reasonable necessity". That question is thus open for this Court to decide.

I believe that the views expressed by Judge Van Dusen are more consistent with the flavor, although not compelled by the holding, of the interlocutory appeal. Judge Rosenn's approach would make the doctrine virtually unavailable to the private condemnee who would rarely, if ever, be able to prove that its facilities were "factually" necessary or "reasonably necessary" in a strict sense. In fact, Judge Rosenn seems to go even further. He suggests that the appropriate test is that set forth in *United States v. Streets, Alleys & Public Ways*, 531 F.2d 882, 886 (8th

Cir. 1976): that there be a legal or factual *obligation* to provide the facilities. This test resurrects the doctrine expressly rejected by the interlocutory opinion; no private condemnee is under a factual obligation (whatever that means) to provide its facilities any more than it is under a legal obligation to do so.

Further, I do not agree with Judge Rosenn that the charge to the jury on this aspect of the case was favorable to the Synod. In my view, the charge was prejudicial to the Synod, and it was fundamentally in error. The interlocutory opinion rejects the duty analysis and plainly holds that a condemnee may be entitled to the cost of substitute facilities where those facilities exist by virtue of "discretionary determinations as to community need." *564.54 Acres I*, at 800. This quoted language is directly at odds with any concept of duty, regardless of how broadly the source of such duty may be defined. Yet the charge to the jury focused on the condemnee's duty to replace the condemned facility. See text of charge quoted in Judge Van Dusen's opinion, *supra*, at 20, n.16, and in Judge Rosenn's dissent, *infra*, at 43, n.11. It directed the jury to find against the Synod if it found that it was under no duty to replace the camps.

Judge Van Dusen's view that a private, nonprofit condemnee may be entitled to the cost of substitute facilities if such facilities serve to "make the community a better community" is consistent with the interlocutory opinion. It is the only test that will in any real degree make this measure of compensation available to the private, non-profit

owner. However, I think that application of this standard illuminates the basic flaw in the interlocutory appeal's holding that private, non-profit owners are entitled to the cost of substitute facilities measure of compensation.

The rationale of the interlocutory ruling is as follows. The Fifth Amendment taking clause imposes an obligation upon the federal government not to take "private property" without just compensation. The public property of the state or its subdivisions is "private property" under the Fifth Amendment insofar as the federal obligation to make compensation is concerned. *Jefferson County v. TVA*, 146 F.2d 564 (6th Cir.), *cert. denied*, 324 U.S. 891 (1945); *Town of Bedford v. United States*, 23 F.2d 453 (1st Cir. 1927); *Town of Nahant* v. *United States*, 136 F. 273 (1st Cir. 1905). It has been held that just compensation upon condemnation of a community facility owned by a governmental entity may, in appropriate cases, be the cost of constructing substitute facilities. To disallow this measure of compensation to a private owner would distinguish irrationally between public and private owners of community facilities. Moreover, it would encourage the government to make discriminatory decision as to which property it will condemn, and could, thus, under certain circumstances, raise serious First Amendment problems.

If I were writing on a clean slate, I am not certain that I would hold that a governmental entity is entitled to the cost of substitute facilities as a measure of just compensation, at least where the condemning authority imposes no legal obligation on the condemnee to replace the condemned facilities. But even accepting that the cost of substitute facilities may be appropriate where the condemnee is a governmental unit,[1] to distinguish between a governmental owner and a private, non-profit owner seems to me no more invidious than the discrimination which results when the doctrine is applied to a private, non-profit owner but not applied, for instance, to a private individual whose property is not held for resale and who, because of any number of reasons, will not be able to replace the condemned property on the market for a price equivalent to its fair market value.

The distinction between the private owner who holds property for his own use and the private owner who devotes his property to a community purpose might be said to lie in the fact that condemnation of the former's property, even if the owner cannot replace it, injures only the private property owner whereas condemnation of the latter injures a larger community. But such a distinction is not valid. A privately owned factory enriches the community by providing jobs for its residents and monies for its tax coffers. A privately owned home benefits the community by sheltering some of its residents. A community may well be a better place in which to live if its residents have jobs, or shelter, just as it may be a better place to live if there are museums or summer camps open to its children or legitimate theatres run for profit. But attempts to compensate anyone but the property owner for loss lead to questions of value which are impossible to resolve.

Moreover, attempts to compensate the larger community through a condemnation award to a private entity are frought with dangers. Putting aside, for the moment, the First Amendment's strictures, the courts are simply in no position to insure that the compensation award will continue to be devoted to serving a community purpose or the particular community purpose which the jury has found makes the community a better place in which to live. It is not simply a question of insuring that the condemnee does not divert the funds; community needs and desires may change and may render the facility wholly superfluous. In that event, even if it were possible, it would serve no purpose to require that the condemnee continue to operate the facility and if it ceases operation the condemnee may well reap a windfall.

In fact, with or without misuse by the condemnee of the award or a change of circumstances as described above, a windfall *necessarily* occurs upon

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[1] The Supreme Court has stated:

> The guiding principle of just compensation is reimbursement *to the owner* for the property interest taken. "*He* is entitled to be put in as good a position pecuniarily as if his property had not been taken. *He* must be made whole but is not entitled to more."

United States v. Virginia Elec. & Power Co., 365 U.S. 624, 633 (1961)(emphasis added).

Perhaps it is not inappropriate to view the people or the community as the owner of a public facility and thus to seek to indemnify them for the taking of a public facility. But I can see no real sense in which the community can be viewed as the owner of a private, non-profit facility and thus no reason to attempt to indemnify it for the taking.

application of the doctrine of the cost of substitute facilities. Under the rule of *564.54 Acres I,* the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated facilities with brand new ones. The finder of fact is not permitted to consider the benefit which accrues to the condemnee when new facilities replace those with expired useful lives. No deduction can be made for depreciation.[2]

Where church-owned property is involved, constitutional obstacles present themselves no matter which narrow path we choose to follow. Attempts to supervise the use of the condemnation award will run afoul of the First Amendment's entaglement proscription. Thus, there is no way to insure that an award premised on use for substitute facilities will not be pocketed. Yet, in addition to offending our sense of fairness, any system of compensation which results in a windfall to the property owner may well violate the constitutional command that the government not aid religion.

But more fundamentally, when the condemned facility belongs to a religious organization, it is the inquiry which is as the very heart of the determination that the condemnee is entitled to the cost of substitute facilities which is obnoxious under our constitutional framework. The judge or jury has no right to pass on the "benefit" or the "necessity" to the community of such installations.

Both Judge Rosenn and Judge Van Dusen apparently agree on the impropriety of the government's comments in summation with respect to possible spiritual profit which accrued to the Synod through operation of its summer camps. I fully agree. They were improper, first, because they may have caused the jury to conclude that the Synod was not entitled to more than fair market value because it had failed to satisfy the not-for-profit aspect of the test. More important, however, they were improper because they must have caused the jury to speculate on the desirability of Lutheran-run summer camps.

Judge Rosenn notes, at 45, n.12, that the government now contends it could argue to the jury that a Lutheran camp was not providing a "public benefit" because it was operated solely for the benefit of the Lutheran church. Judge Rosenn suggests that this "line of argument is permissible". I do not think it permissible. It is grotesque to find the United States Government making such an argument. Yet I am forced to recognize that this argument is justified—even compelled—by *564.54 Acres I* which requires the court to determine and the government to litigate the reasonable community necessity of the thing condemned.

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[2] *564.54 Acres I* states, at 799-800 (emphasis added):

> Typical of facilities which simply cannot be valued in the marketplace, or by capitalized earnings, *or by depreciated replacement cost,* are those erected for common public purposes by states or their public subdivisions; roads for example. Fair indemnification in such circumstances requires compensation sufficient to provide a substitution for the unique facilities so that the functions carried out by or on behalf of members of the community may be continued. Depreciated replacement cost often will not permit continuation of such functions. To meet the requirement of fair indemnification for the taking of community facilities the courts have developed the "substitute facilities" measure of compensation.

The Second Circuit has approved a deduction for depreciation from the cost of substitute facilities in the very case whose approach the interlocutory opinion "prefers". See *United States v. Certain Property in Borough of Manhattan,* 403 F.2d 800, 804 (2nd Cir. 1968). The commentators have endorsed a depreciation deduction to avoid the windfall which would otherwise result. See Note, *Cost of Substitute Facilities as a Measure of Just Compensation When There is a Private Condemnee,* 1975 Duke L.J. 1133, 1145-1146 (1975); Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property,* 67 Colum. L. Rev. 1083, 1118-1119 (1967).

It is true, as Judge Van Dusen notes, that there is no direct evidence in the record to indicate that the Synod used the camps to proselytize. But there was evidence presented to the jury that the camps were run by a church organization as part of the church's religious mission, and in accord with its Articles of Incorporation which provide that "the purpose of the corporation is to promote the Christian religion according to the tenets of faith as set forth in the Laws of the Lutheran Church of America." There was evidence that each of the three condemned campsites included a chapel and that cabin devotions were part of the camp day and that religion classes were part of the camping program. The camps were run by Lutheran clergymen. Although Lutheran and non-Lutheran children were welcome, Lutheran children were given a slight price advantage. With this evidence before it, it is difficult to see how a juror would decide the question of desirability without reference to his own religious predilictions and prejudices. And the government's argument was a direct appeal to those religious preferences. This is not an appropriate area of inquiry for a jury or for a judge, but it is unavoidable to owners of church property. I do not believe that we can shut out eyes to these

problems. It is just a matter of time until we see the case to which the panel on the interlocutory appeal refers in its hypothetical: condemnation of the ancient church edifice itself. The court will then be forced to address the issues I now perceive to arise in the instant case.

In sum, I have grave reservations regarding the cost of substitute facilities doctrine generally. I do not believe it should apply even to a governmental unit, unless the condemnor itself requires the condemnee to replace the facility which it has taken. Where the doctrine does apply, however, I would require the government to pay only the cost of a new substitute facility, less the depreciated life value of the facility condemned. Further, if the doctrine does apply, the existence of a market for the condemned facility is irrelevant.

I further believe that the cost of substitute facilities measure should not be extended to the private sector, but, if it is, I am convinced it must be applied to all private condemnees for whom the cost of replacement less depreciation is more than what the government offers. The use of the "reasonably necessary" test to discriminate among private condemnees is, for me, impermissible.

However, because I am bound by the holding in *564.54 Acres I*, and because under the holding of that case as elucidated by Judge Van Dusen, I do not believe the litigants got a fair trial, I join Judge Van Dusen in Parts I, II, and III of his opinion and I vote to reverse.

ROSENN, *Circuit Judge*, Dissenting

This was a long, complicated, and carefully tried case in which we have already had one interlocutory appeal. We now face a second appeal after a trial to a jury and verdict for condemnee. If Judges Van Dusen and Stern have their way, I believe we will needlessly have another trial and probably a third appeal.

I respectfully dissent to the remand of this case for another trial because I believe first, that the jury charge given by the presiding judge, the late Chief Judge Sheridan, faithfully adhered to the principles of law enunciated by us in *United States v. 564.54 Acres of Land I*, 506 F.2d 796 (3d Cir. 1974), concerning condemnation of public facilities owned by a private nonprofit property owner, and that no party objected to the instructions; second, that the errors, if any, in the charge were minimal and nowhere near the magnitude of fundamental error; and third, that any possible misstatement of the law by the Government in its closing remarks was specifically cured by the trial judge.

Judge Van Dusen's opinion finds fault with the trial judge for his failure to give an adequate charge to the jury and for his failure to censure the Government for its closing remarks. Before assessing the district court's action, I believe some additional information pertaining to the Synod's campsites would

provide perspective on the difficulties in applying the mandate in our decision in *564.54 Acres of Land I*, *supra*.

The condemned camps, located on land formerly used for farming purposes, were situated a few miles north of Shawnee on the Delaware in Monroe County, Pennsylvania. There were over 800 camps in the Commonwealth of Pennsylvania at the time of the taking, 45 of which were located in Monroe County alone. In developing the Synod's campsites, various facilities were constructed, the last of which were cabins built in 1955. These facilities and the camps' programs were described by one expert witness at trial as not as good as some of the camps in the area and superior to others—"generally speaking, they were average to above average."

These camps were typical of many other camps for children in the area, having similar activity programs and recreational facilities. The Synod's camps may have differed from the others in goals, philosophies, and, in some instances, religious training. Overall, however, one could reasonably have concluded that the condemned camps provided no special service to the community and that they were in pertinent ways like other camps such as Camp Wyomissing, located immediately to the south of the Synod's camps, operated as a nonprofit facility by the Big Brothers Association, and Camp William Penn, located some ten to twelve miles away, operated by the City of Philadelphia.

There was evidence in the record that the highest and best use of the condemned property was for camping purposes, although even when used as a camp, the property was handicapped by limited availability of level ground and a public road running through the camp's grounds. Some evidence suggested that the attractive location of the property along the Delaware River and its ready accessibility to the main arteries leading to major urban centers, made the property attractive for residential and commercial development, especially in view of the active real estate market in the Poconos during the "sixties" and the early "seventies."

Two types of camps were operating in Monroe County at the time of the taking: (1) organizational camps sponsored by church groups or other nonprofit associations such as the Girl Scouts, Boy Scouts, and the Young Men's Christian Association, and (2) private camps run by individuals for profit. There was evidence of record to show that in June of 1970—the time of the taking—there was a demand for either type of camp on the open market and that eleven specific sales were consummated between 1966 and 1972 in Monroe County, including Camp Wyomissing.

I now turn to an assessment of Judge Van Dusen's conclusion that the trial judge erred in his action in this case.

I. THE CHARGE TO THE JURY

The owner of property in every condemnation is entitled to "just compensation" under the fifth amendment. The traditional standard for measuring "just compensation" for private parties is the fair market value of the property condemned. This standard for private parties is often inadequate recompense for the taking of public facilities—bridges, roads, schools, or the like—because there is no ready market for such facilities. Thus, courts have evolved the substitute facilities doctrine which awards such public condemnees damages sufficient to adequately replace the public facility taken.

In *564.54 Acres of Land I* we "became the first federal court of appeals to conclude that the cost of substitute facilities could be applied as a measure of just compensation not only to public owners of nonprofit facilities but to private owners of such facilities as well." Note, *Cost of Substitute Facilities as a Measure of Just Compensation When There Is a Private Condemnee*, 1975 Duke L.J. 1133, 1134. We rejected the contention of the Government that the doctrine could only be applied to a taking of governmental facilities, concluding that "the substitution of facilities measure of fair compensation is available to private owners of nonprofit community facilities." 506 F.2d at 802. Our opinion was vague, however, as to the exact standards to be applied in determining whether the doctrine should be applied to any given case. We stated that in the preliminary stage in which the case was before us we had no occasion to decide whether this was "an appropriate case" to apply the doctrine. *Id.*

Judge Van Dusen concludes that *564.54 Acres of Land I* held that the substitute facilities measure of fair compensation is available to private owners of nonprofit facilities "if there is no ready market for the facilities and if the facilities are 'reasonably necessary to public welfare.'" Maj. Op. at 3. (For convenience, Judge Van Dusen's opinion will be cited Maj. Op.)[1] It is apparent from the record that both the Government and the Synod shared in this understanding of our interlocutory opinion and they persuaded the trial court to adopt this as the test for

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[1] I do not share Judge Van Dusen's confidence that United States v. 564.54 Acres of Land I, 506 F.2d 796 (3d Cir. 1974), laid down an inexorable principle as to when the doctrine should be applied. In my view, we went only so far as holding that the substitute facilities measure might be applied to "private owners of nonprofit community facilities . . . *in appropriate cases.*" *Id.* at 802 (emphasis supplied). The opinion does, however, contain a discussion of the genesis of the doctrine. Certain language indicates that the substitute facilities measure might be used for compensation in cases in which "neither a fair market value nor a capitalized earnings approach . . . will produce a fair result"—roughly a "ready market" requirement. *Id.* at 799. Similarly, the opinion states that the doctrine has been used as a measure of "fair compensation for a structure reasonably necessary to public welfare." *Id.* 800. But, nowhere do we hold that these are in fact the elements of our test. We do, however, cite with approval the approach of the Second Circuit, which in my view encompasses the elements of no "ready market" for the facility and its reasonable necessity to the public welfare. *See* United States v. Certain Property in Borough of Manhattan, 403 F.2d 800, 803-04 (2d Cir. 1968)(The Bathhouse Case).

Although the exact standards to be applied were not clearly defined by the interlocutory opinion, I do not intend to imply, as Judge Stern suggests I do, that it was impossible for the district court to apply the appropriate standards. In fact, I specifically assert that Judge Sheridan "faithfully adhered to the principles of law enunciated by us" in the interlocutory opinion.

applicability of the doctrine.[2] Although the parties agreed to the applicable test, there was little agreement as to the exact definition of the components used in the standard—"ready market" and "reasonably necessary to public welfare." Moreover, nowhere in our prior opinion did we define either of these terms with any specificity.

With little guidance from our interlocutory opinion, the trial court faced the difficult task of constructing its charge to the jury based on an agreed upon test with contested definitions as to each of its critical elements. Judges Van Dusen and Stern hold that the instructions eventually fashioned by the district court in its charge inadequately failed to state the law of substitution of facilities, given the gloss asserted by Judge Van Dusen on the ambiguous terms of our interlocutory opinion. I believe that Judges Van Dusen and Stern exceed judicious expectations by demanding that a district judge conform to standards never before enunciated by the appellate court. In view of our implicit mandate in *564.54 Acres of Land I* to the district court to apply the substitute facilities doctrine "in appropriate cases" and the failure of any party to object to the charge as given, no error should be found in the jury instructions. Even if some errors may have seeped through, it is not so fundamental as to require reversal, particularly in light of the novel principles enunciated by Judge Van Dusen and the uncertainty of the law in this area.[3]

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[2] *See* United States v. 564.54 Acres of Land II, D.C. Civ. No. 70-240 (M.D. Pa.) trial transcript (Tr.) at 716 (Synod closing argument), Tr. 742-43, (Government closing argument), Tr. 797-98 (District court's instructions).

(a) *No "Ready Market"*

At trial there was a serious dispute as to whether the concept of ready market refers to a market in which the facility taken can be sold—the Government's contention—or whether the concept refers to a market in which a comparable facility can be purchased—the Synod's contention. Our interlocutory opinion has language which might support the view of either of the parties, but which also casts some doubt as to whether either party's contention accurately states the law.[4] Judge Van Dusen opts for the Synod's cost of replacement theory, which for purposes of this opinion I shall assume to be correct.

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[3] As Judge Van Dusen notes, no party at any time in the district court, during motions for a new trial, or in briefs submitted to this court, ever objected to the jury charge. We have held that we will consider objections to the charge raised after trial or by us *sua sponte* only if "the error in the charge was fundamental and highly prejudicial, and our failure to consider the error would result in a gross miscarriage of justice." Callwood v. Callwood, 233 F.2d 784, 788 (3d Cir. 1956). I believe the record in this case does not disclose any miscarriage of justice and in part II of this opinion I will demonstrate that error, if any, is only by virtue of a new standard enunciated since the trial by Judge Van Dusen's opinion.

[4] In the interlocutory opinion we discuss the development of the substitute facilities measure of just compensation. We state that there are three types of property which might be taken: (1) facilities with a ready market for which fair market value would be full compensation; (2) profit-making facilities for which market value would not be full compensation but whose taking could be indemnified by present value of capitalized future earnings or some other comparable measurement; and (3) facilities for which neither fair market value, capitalized earnings, nor any other traditional measurement would provide fair compensation. *564.54 Acres of Land I, supra,* 506 F.2d at 799. We state that as to facilities that could not be valued in the marketplace, the substitute facilities measure would be used to provide fair compensation. *Id.* This would appear to support the Government's view of

(footnote continued)

Judge Van Dusen states that the requirement that there be no ready market for the condemned facility means that "the owner exercising reasonable diligence, must have been unable to purchase a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility." Maj. Op. at 21. He suggests that the instructions given by the trial court on this element of the substitute facilities doctrine were "substantially correct," but because of their confusion on one point, further clarification must now be given. I believe that a close and fair reading of the district court's charge shows that it clearly presents the "ready market" issue to the jury and is also quite favorable to the Synod's position. It is also consistent with Judge Van Dusen's theory of ready market. Furthermore, the Synod's failure to object to the charge is powerfully persuasive that the charge was not confusing.

The court gave four separate instructions on the ready market element. I believe that three of those

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(footnote continued)

the "ready market" cases in which a market value *could* be established for such property, substitution of facilities might still be available if the market value was insufficient to allow replacement of the condemned facility. *Id.* at 800. This would appear to support the Synod's position.

It may be that the language supports neither the Synod nor the Government for our statements are also consistent with the approach that the substitute facilities measure is only available if the facility taken is not commonly bought *or* sold in the marketplace. The Second Circuit, whose approach to substitute facilities has been cited by us with approval, *see* n.1, *supra,* applies the doctrine when the "market value test is unworkable because the facilities are not commonly *bought and sold* in the open market. . . ." The Bathhouse Case, *supra,* 403 F.2d at 803 (emphasis supplied). Thus, it is quite possible that Judge Van Dusen's acceptance of the Synod's definition of "ready market" misconstrues the meaning of our interlocutory opinion.

substantially adhere to the definition of ready market advocated by Judge Van Dusen and that the fourth, even if unclear, was cured by the combination of the three acceptable sections of the charge and by a later cautionary instruction as to the fourth.[5]

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[5] (1) In the first explanation of the ready market element of the substitute facilities doctrine, the district court stated that if

> the nature of the property [taken] or its use produces a wide discrepancy between the value of the property to the Landowner, [and] the price at which it could be sold on the open market; . . . and *if the fair market value of the condemned property is substantially less than the cost of constructing functionally equivalent substitute facilities,* then the substitute facilities doctrine is a proper method of valuation. [Tr. 797]

There can be no doubt that this view states with substantial clarity the ready market definition required by Judge Van Dusen as it allows the jury to find for the condemnee in the event the cost of replacement is more than market value. The italicized language substantially tracks the language of his construction of this element of the test.

(2) The court also specifically defined "ready market" later in its instruction in a manner totally consistent with Judge Van Dusen's requirements, stating that the jury "must find there was no ready market for [the taken] facilities, if the condemnee *could not replace* the three condemned camps in the marketplace, within a reasonable time." [Tr. 802.] This is in essence a restatement of the requirement as framed by Judge Van Dusen.

(3) In another section of its charge, the court instructed the jury that if they found that the camps

> were single-purpose facilities, operated not for profit, and for which there was no ready market, . . . and if . . . the fair market value of the condemned property [was] substantially less than the cost of constructing functional equivalent substitute facilities, [they would be required to] find that the substitute facilities doctrine applie[d]. [Tr. 802.]

In view of the definition of ready market discussed in (2) above, I have serious reservations whether anything in this part of the court's charge could have confused the jury on the element of ready market.

The district court also told the jury that the "*existence or non-existence* of fair market value for the condemned facilities may not in and of itself be determinative of any issue in the case." [Tr. 798.] This instruction is cumulative of the others given and lends even greater support to my belief that the district court virtually adopted Judge Van Dusen's view of ready market, a view, the validity of which, I considerably doubt. *See* n.4, *supra.*

(footnote continued)

(b) "*Reasonably Necessary*"

As with the element of "ready market," the Synod and Government take divergent views on the meaning of "reasonably necessary to public welfare." The Government construes this term to mean that the facility must at least be reasonably necessary to

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(footnote continued)

(4) Therefore, none of the above instructions may be deemed error. All unambiguously state the definition of ready market articulated by Judge Van Dusen.

Apparently, it is the fourth instruction given by the district court that may be at odds with the Synod's theory of ready market. In this instruction, the district court stated the general rule that just compensation is to be measured ordinarily by fair market value and that fair market value is defined as the price agreed upon in the open market by a willing seller and a willing buyer. The court further stated that there are instances, such as the sale of a rarely transferred specialty or the sale of public property owned by a state or municipality, in which no market value in the ordinary sense exists. The court then stated that if the jury did not find this to be such a case, "then the property should be treated like that of any other private condemnee."

On its face, this instruction may be inconsistent to the other three on the concept of ready market. Nonetheless, I believe that the charge, in its totality, is fair to the Synod even with these remarks because it largely is based on the Synod's replacement market approach. Thus, I submit that even in the absence of any remedial action by the trial court to cure the inconsistency in the charge caused by this instruction, no error could be found. In this case, however, the district court cured any possibility of error by instructing the jury to disregard this part of the charge.

After reading the charge to the jury, the court asked if there were any objections to the charge. Counsel for the Synod stated that he objected to that part of the charge which restricted the "substitute facilities doctrine to a rarely transferred specialty and the public property of a state or municipality." [Tr. 808.] The court sustained the objection and directed the jury to disregard the objectionable instruction and to consider his other instructions "because the doctrine can apply to something which is not public." He concluded by instructing them to consider the other factors which he had given them. [Tr. 808-09.]

These were the final remarks of the court prior to giving the case to the jury. Any potential problems with the charge as to ready market were cured by this instruction. The remainder of the charge states clearly and accurately the applicable principles of law governing ready market required by Judge Van Dusen.

the community, whereas the Synod interprets the terms as loosely synonymous with beneficial to the community. Judge Van Dusen adopts a variation of the Synod's view, holding that for a facility to be reasonably necessary to public welfare "it must provide a benefit to the community that will not be as fully provided after the facility is taken." Maj. Op. at 20. He concludes that the trial court's charge on this element of the test is "confusing and misleading," as it fails to "accurately reflect [Judge Van Dusen's new] interpretation of the law." *Id.* I agree with Judge Van Dusen that this part of the court's instructions does include language which supports the Government's reasonable necessity view.[6] But because I believe the test advocated by Judge Van Dusen and accepted by Judge Stern breaks with the requirement of "reasonably necessary" as enunciated by this court in *564.54 Acres of Land I* and every other federal court that has spoken on this issue, I disagree with their reversal on this point. The district court's

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[6] Judge Van Dusen characterizes the Government's position on "reasonable necessity" as requiring the facility to be necessary to the community "in a strict sense." Maj. Op. at 15. By this he understands the Government to mean that the facility must be "indispensable." Maj. Op. at 15. This misconstrues the Government's position as they have consistently maintained only that the facility be "reasonably necessary."

Judge Van Dusen asserts that the expression "reasonably necessary" is difficult to understand; he equates it with "reasonably good" and in turn equates it with "beneficial." Maj. Op. at n.14. These semantic exercises are unwarranted. The words "reasonable" and "necessary" are used by courts and by ordinary citizens every day. Combining the two terms together does not muddle their otherwise clear meaning. The common meaning of the phrase is reflected in Judge Van Dusen's statement that "reasonably necessary" means "not entirely necessary." No further gloss is needed, and if it were, we would have so provided in our interlocutory opinion. We did not then and need not now.

instruction should not be deemed error as it merely states the generally accepted principles of law.

At no time did this court in *564.54 Acres of Land I* state anything that could be construed as holding that a facility must be merely "beneficial" to qualify for the substitute facilities measure. Moreover, we specifically stated that we preferred the approach of the Second Circuit which "recognizes that the decision to replace a facility may involve discretionary determinations as to community need . . . for a structure *reasonably necessary* to public welfare . . . ." *654.54 Acres of Land I, supra,* 506 F.2d at 800, *citing with approval, United States v. Certain Property in Borough of Manhattan,* 403 F.2d 800, 804 (2d Cir. 1968) ("*The Bathhouse Case*") (emphasis supplied). A review of principles outlined by the Second Circuit and its progeny demonstrates conclusively that the requirement of "reasonably necessary to public welfare" has never been given the construction advocated by the majority.

Until *The Bathhouse Case, supra,* the conventional wisdom was that the substitute facilities doctrine was unavailable as a measure of just compensation unless the public condemnee could prove a legal obligation to replace the facilities. Apparently, Judge Stern would prefer that this be the current law as well. However, by the time this case was tried, the Second Circuit specifically rejected this view and held that an obligation to replace a public facility could be found not only by a law compelling the condemnee to do so, but also by a necessity for the public condemnee to reopen the facility brought about by the community's need.[7] The court further stated that even if a structure were reasonably necessary for the public welfare, not all facilities taken need be replaced if the public necessity for the facility no longer exists. *The Bathhouse Case, supra,* 403 F.2d at 804.

Similarly, no other federal court that has spoken on this issue has ever adopted the "beneficial" test; each has limited the application of the substitute facilities doctrine to situations in which the substitution is deemed necessary for the public welfare. *See, e.g., United States v. 3,727.91 Acres of Land,* 563 F.2d 357, 359-60 n.2 (8th Cir. 1977) (condemnee entitled to substitute facilities measure "if the structure is reasonably necessary for the public welfare"); *United States v. Streets, Alleys & Public Ways,* 531 F.2d 882, 885 (8th Cir. 1976)("must furnish only substitute facilities that are reasonably necessary in the circumstances"); *Washington v. United States,* 214 F.2d 33, 43 (9th Cir.), *cert. denied,* 348 U.S. 862 (1954)(application of substitute facilities denied as reasonably adequate substitutes existed). Even as early as 1957, this court stated that the cost of substitute facilities measure could be applied to compensate for the taking of roads so long as the substitute facility would

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[7] "When the ... [public] condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. ... The duty may be legally compelled or one which arises from necessity. ... The distinction has little practical significance in public condemnation." *The Bathhouse Case, supra,* 403 F.2d at 803.

be necessary. *See United States v. Certain Lands in Middlesex County,* 246 F.2d 823, 824 (3d Cir. 1957).[8]

Apparently, the only support for Judge Van Dusen's "benefit" theory is found in law review commentary about our interlocutory opinion. *See* 1975 Duke L.J., *supra;* Note, *Substitute Facility Measure of Just Compensation Is Available to Private Owners of Nonprofit Community Facilities in Appropriate Cases,* 6 Seton Hall L. Rev. 711 (1975).[9] The

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[8] In footnote 11, Maj. Op., Judge Van Dusen attempts to demonstrate that many of the cases which have denied application of the substitute facilities doctrine were, in fact, cases in which no benefit could have been provided by substitute facilities—essentially consistent with his test. He contends that even though courts state the test as one of necessity, they use an approach based on benefit. From this Judge Van Dusen reasons that the district court should have charged "benefit" rather than "necessity." Close analysis of these cases shows that they could not have been using the "benefit" test. *See, e.g.,* United States v. Streets, Alleys & Public Ways, 531 F.2d 882 (8th Cir. 1976)(although population was reduced from 130 to 30 people, new roads would have provided a benefit; but the court holds that because other facilities are *adequate,* no need for substitutes exists); Washington v. United States, 214 F.2d 33 (9th Cir.), *cert. denied,* 348 U.S. 862 (1954) (Although few people would travel a substitute road, it would provide a clear benefit to them. The court, therefore, denies applicability of doctrine as substitute unnecessary). Thus, the refusal of a court to apply the substitute facilities doctrine when no benefit results does no more than state the obvious—such facilities are unnecessary.

Judge Van Dusen suggests that I fail to distinguish between the benefit to a few and the benefit to the community as a whole. I submit that that is precisely the crux of our difference, for under his view that distinction is difficult if not impossible to make. In this case, for example, is the test whether the camps provide a benefit to the Lutheran community, the community of camping age youngsters, the Philadelphia community, or the community of the state of Pennsylvania? In putting the test in terms of benefit that definition is critical. Under my view, that is why courts have adopted the reasonable necessity test which by its own terms frames the key question—is there a *need* to replace the facility?

[9] Both the Duke note and the Seton Hall note are based on suggestions made by a commentator in Note, *Just Compensation and the Public Condemnee,* 75 Yale L.J. 1053 (1966), that when a *governmental body* decides facilities are necessary to the public welfare, its

(footnote continued)

Eighth Circuit has already specifically rejected this approach in *United States v. Streets, Alleys & Public Ways*, *supra*, 531 F.2d at 886 (condemnees suggested that substitute facilities need only serve a rational governmental purpose, but the court holds that determination to provide substitute facilities turns on whether there is a legal or factual *obligation* to provide them). The consistent approach of the federal courts is to require that the substitution be reasonably necessary before application of the substitute

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(footnote continued)
views are entitled to judicial deference and must be respected unless shown to be irrational. The notes both recommend acceptance of this standard of deference for decisions also made by private landholders as to public need for their property.

I believe that this standard is questionable even with a governmental body charged with administrative responsibility for the operations of government, including provision of public facilities for the community. In the private context, it is unthinkable.

Under the proposed standard, governmental condemnors would be subject to the whims and caprices of private nonprofit swimming clubs, ice-skating clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations who might discern a need for their facilities but which the community might find frivolous. There may well be a plausible argument for deference to public officials' exercise of discretionary determinations of their communities' need to replace a condemned public facility. In a situation involving a private landowner, however, such deference to his opinion of need is wholly unwarranted because of his self-interest and lack of authority to speak for the community. The jury is the appropriate body to decide whether the public needs replacement of a facility owned by a private condemnee.

Judge Van Dusen asserts that my fears are overdrawn and a jury will not allow substitution of facilities in the situations I pose. He asserts that the trial court may instruct the jury to disregard the "benefit" test if the benefit to be gained is only by a narrow segment of the community. I believe, however, that under his test the only burden on the condemnee is to prove that his facility provides a benefit to the community which will be reduced after the taking. I stand by my conclusion that this would encompass almost any facility in a community regardless of how many or how few individuals could use the facility. As to Judge Van Dusen's fear that a "reasonable necessity" test may prevent the substitution of facilities for an art museum or zoo, I need only state that facilities of this sort have never been a problem under the traditional test.

facilities doctrine. An examination of the district court's charge in this case shows that Chief Judge Sheridan faithfully responded to the interlocutory appeal by stating this generally accepted principle governing the element of reasonable necessity. Moreover, the court's instructions as a whole were totally consistent with the approach of the Second Circuit which we cited with approval in *564.54 Acres of Land I*.[10]

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[10] The district court's charge on the element of "reasonably necessary" was stated fairly and favorably for the Synod, encompassing the following:

> [I]f the condemned facilities provide a reasonably necessary service to the community or the facilities are reasonably necessary for the public's welfare . . . then the substitute facilities doctrine is a proper method of valuation. [Tr. 797.]
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> You may find that the substitute facilities doctrine applies if the facilities [were] . . . fulfilling a community need or purpose. In determining whether or not the condemned facilities provided a reasonably necessary service to the community, you may consider that the camps were owned and operated by the Lutheran Church, and that the furthering of the Church's religious mission may itself constitute a service to the community. [Tr. 798.]
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> These two valuation doctrines rest upon the theory that if the Synod is under a duty to continue operating the taken facility, it is entitled to sufficient recompense to permit it to continue but if the Synod is not under such a duty, the property should be treated like that of a private condemnee. Each doctrine involves the application of different rules of law.
>
> In determining which doctrine [fair market value or substitute facilities] is to apply, the determination rests fundamentally on the existence or non-existence of the community's need for the property condemned. This will be your first and fundamental question. The duty to replace need not be legally compelled. It may arise from necessity. [Compare this to *The Bathhouse Case*, *supra*, 403 F.2d at 803, *see* n.7, *supra*, ("The duty may be legally compelled or one which arises from necessity. . . .")]
>
> You should also note that not every condemned facility needs to be replaced. Substitution may be unreasonable or unnecessary. The public need may no longer exist or adequate alternative

(footnote continued)

Judges Van Dusen and Stern reverse because of the failure of the district court to abide by the novel definition of "reasonably necessary" now pronounced by them after the trial of the case. This requires the kind of omniscience that we have no right to exact from a district court. I believe that the district court would have committed error had it charged other than it did—the generally accepted principle cited by us in our interlocutory opinion. Judges Van Dusen and Stern may believe their theory is superior to the generally accepted interpretation of the doctrine,[11] but they cannot adopt that novel theory, overrule our prior opinion *sub silentio*, and hold the district court in fundamental error because it relied on our previous statement of the law. Therefore, I see no error in this part of the charge. I believe my view in this respect is confirmed by Judge Stern who agrees that the Government's argument on reasonable necessity "is justified—even compelled" by our interlocutory decision.

II. FUNDAMENTAL ERROR

Even if some error is seen in the charge to the jury—a doubtful proposition in light of the precedents of this court—the error must be so fundamental that our failure to reverse would result in a miscarriage of justice. As we previously have alluded, no part of the charge was objected to by the Synod. As Judge Van Dusen notes, the failure to object and state grounds for the objection with specificity, F.R. Civ. P. 51, does not bar relief to a party in an extraordinary case. *See Callwood v. Callwood*, 233 F.2d 784 (3d Cir. 1956). An examination of the cases cited by him demonstrates, however, that in this case the error could not be deemed so fundamental and prejudicial that we should overturn the district court.

The cases cited by Judge Van Dusen as having reversed a trial court because of erroneous jury instructions, either objected to for the first time on appeal or noted by us *sua sponte*, were based on misstated clear principles of law involving "plain" error. *E.g., Ratay v. Lincoln National Life Ins. Co.*, 378 F.2d 209, 212 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967) (lower court incorrectly charged jury on burden of proof, "firmly established" that wrong stan-

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(footnote continued)

facilities may be available. [Compare this to *The Bathhouse Case*, *supra*, 403 F.2d at 804. ("This is not to say that every facility need be replaced. . . . Substitution may be unreasonable or unnecessary; the public need may no longer exist or adequate alternative facilities may be available.")] [Tr. 801-02.]

* * *

If you find that the Synod have proved a need to replace the condemned camps, [then they should receive a sufficient award to replace the facilities].

* * *

[11] Although I do not specifically question the validity of Judge Van Dusen's holding that "reasonably necessary" means that "the facility [taken] must have provided benefits to the community that will not be as fully provided after the facility is taken," Maj. Op. at 21, I believe substantial problems may ensue from adoption of this test. Is it to be the rule of this court that the owners of a not-for-profit privately owned tennis facility which cannot be replaced in the marketplace, taken by the federal government, are entitled to an amount sufficient to replace their facility? Will every condemned private non-profit club now be entitled to substitution of facilities? Under the majority test, so long as a benefit to the community is reduced by the taking, they would be so entitled, regardless of the *need* for the replacement. I believe that this alone points to the unwarranted extension of the doctrine by the majority and compels me to dissent.

dard used); *Wilson v. American Chain & Cable Co.*, 364 F.2d 558, 562 (3d Cir. 1966) (lower court erred in jury charge on superseding cause in view of settled law); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 470 (3d Cir. 1975), *cert. denied*, 389 U.S. 973 (1967) (lower court erred in jury charge on assumption of risk, misstated clear Pennsylvania law); *Mazur v. Lipschutz*, 327 F.2d 42 (3d Cir. 1964) (lower court erred in trial charge on vicarious liability, failing to charge the Pennsylvania "Captain of Ship" doctrine); *Leposki v. Railway Express Agency, Inc.*, 297 F.2d 849 (3d Cir. 1962) (lower court erred in jury charge of superseding cause, failed to charge clear elements of rules); *McNello v. John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960) (jury charge on negligence was so general it was equivalent to no charge at all).

This case, if seen at its worst, calls for no more than an application of *Trent v. Atlantic City Elec. Co.*, 334 F.2d 847 (3d Cir. 1964), in which we held that a charge which apparently gave inconsistent instructions, could not be deemed fundamental error when read in whole with the rest of the instruction. 334 F.2d at 857; *see also Callwood v. Callwood, supra*, 233 F.2d at 788. Judge Van Dusen states and Judge Stern agrees that the jury charge on the "reasonably necessary" element of the test was fundamentally erroneous. They find error in the failure of the district court to anticipate an entirely new standard never before articulated in any federal case. Furthermore, they find this error even though the district court did no more than follow the clear test of

the Second Circuit approved in our interlocutory opinion. Their holding extends the *Ratay/Pritchard/McNello* rule far beyond its limited scope of requiring reversal when a court fails to charge according to *clearly established* principles of law. I therefore cannot discern any fundamental error in this case.

III. Government's Closing Remarks

There may be some question as to the propriety of the Government's remarks at closing.[12] They may not have fairly characterized the not-for-profit element of the substitute facilities doctrine, indicating that the Synod though operating not-for-monetary profit might have been receiving another kind —spiritual profit. The remarks apparently were not impressive for the Synod failed to object to them at the time they were made or even to address them in its rebuttal closing argument. It was not until after the jury retired for the day that the Synod thought of objecting and moved for a mistrial.

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[12] These remarks are noted at pages 7-8 of Judge Van Dusen's opinion. In essence, the Government admitted that the Synod operated not for monetary profit, but suggested that they gained a spiritual profit by possibly converting campers to the Lutheran faith. The Government argues now that their closing remarks were proper because they were relevant as to the element of reasonable necessity, bringing into focus the issue of whether the camp was providing a public benefit or whether it was being operated for the benefit solely of the Synod. I believe that this line of argument is permissible, but may encounter first amendment problems at some point. It is unnecessary in this opinion, however, to closely define the boundary of permissible comment on the necessity of church-sponsored activity, especially in view of the court's instruction that "the furthering of the Church's religious mission may itself constitute a service to the community." [Tr. 798.]

Judge Van Dusen states that this objection was timely under *Shepler v. Crucible Fuel Co.*, 140 F.2d 371 (3d Cir. 1944), which he says establishes the principle that an objection to closing remarks of counsel is reviewable so long as it is brought to the attention of the trial court in time for the trial court to have "an opportunity to rule on the matter and correct any prejudicial errors." Maj. Op. at 11. *Schepler*, however, concerns only an evidentiary question and a careful reading of the opinion shows that we adopted the rule of the Eighth Circuit, holding only that objections must be brought *at the proper time* in order to afford the trial court an opportunity to review the objection. We did not specifically state the proper time for such an objection to be made.[13] A review of the law in the Eighth Circuit reveals that the timeliness for an objection to remarks made in closing argument is measured by the time of the prejudicial remarks. *See Sanden v. Mayo Clinic*, 495 F.2d 221 (8th Cir. 1974). Under that view, the objection to the Government's remarks here would be untimely and for us to reverse we would have to find fundamental error. *See Porterfield v. Burlington Northern Inc.*, 534 F.2d 142 (9th Cir. 1976), *Schleunes v. American Cas. Co.*, 528 F.2d 634 (5th Cir. 1976); *Hyman v. Life Ins. Co. of North America*, 481 F.2d 441 (5th Cir. 1973). The remarks of the Government in the instant case rise nowhere near the level of prejudice required for reversal. *See Edwards v. Sears Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975) (testimony attributed to a witness never made at trial); *San Antonio v. Timko*, 368 F.2d 983 (2d Cir. 1966) (personal attacks and outrageous argument that if defendants contest the amount of damages they admit liability). Here, it could not be seriously maintained that a reasonable jury at a trial in which not-for-monetary profit was the consistently pressed issue, could be misled by the closing remarks of a zealous Government attorney. This case is similar to *Lewis v. Penn Central Co.*, 459 F.2d 468 (3d Cir. 1972), in which we held that the failure of the complaining party to object when it could have rebutted any negative inference from a closing argument, coupled with the trial court's refusal to award a new trial, should not require reversal on appeal. 459 F.2d at 468.

Even if the objection were deemed timely and prejudicial, there was no error committed in the trial court requiring reversal because the district court adequately cured the prejudice of the remarks. Judge Van Dusen notes some of the precautions taken by the trial court to prevent prejudice arising from counsel's remarks, but concludes that they were insufficient to cure the taint. I disagree.

The trial court stated clearly that the jury was "to follow the law as stated in the instructions of the Court" and that it would be a violation of the jurors' duty if they based their verdict on "any other view of the law than that given" in the charge. Tr. 788. The court told the jury that their recollection of the facts governed, and that the "statements of counsel are not evidence" but "merely attempts to persuade." Tr. 795-96. The court then *specifically* charged the jury that they could find the substitute facilities doctrine applicable "if the facilities were operated on a *not-for-profit basis, for religious purposes* . . . ." (Emphasis supplied.) Even with the Government's questionable comment, the jury was instructed unequivocally to follow the charge and the charge stated clearly that the jury could find not-for-profit, even if there was a religious purpose. Therefore, no reversible error can be found on this point.[14]

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[13] In Schepler v. Crucible Fuel Co., 140 F.2d 371 (3rd Cir. 1944), we stated that

> "The law requires that errors to be reviewable must have been definitely and timely called to the attention of the trial court, in order to afford that court a fair opportunity to pass upon the matter, and correct its own errors, if any. The purpose is to require counsel, *at the proper time*, to call the attention of the court to the claimed error . . . ." Arkansas Bridge Co. v. Kelley-Atkinson Const. Co., 8 Cir., 282 F. 802, 804.

140 F.2d at 374 (emphasis supplied).

IV. CONCLUSION

To recapitulate, I believe that the record in this case establishes:

(1) No error may be found in the charge to the jury.

(a) The "ready market" element of the jury instruction conformed to the test advocated by Judge Van Dusen and the district court instructed the jury to disregard that part of its instructions which may have been confusing.

(b) The district court correctly charged the jury as to "reasonably necessary," following the mandate of *564.54 Acres of Land I* and the principles consistently enunciated by the federal courts.

(2) Even if any error in the charge were found, it cannot be deemed fundamental inasmuch as the only significant error possibly committed by the district court was its failure to adopt the novel principles now enunciated by Judge Van Dusen and accepted by Judge Stern.

(3) No error may be found in the failure of the district court to sustain the objection of the Synod to the Government's closing argument in view of

(a) its untimeliness, and

(b) the curative instructions given by the district court.

I would therefore affirm the judgment of the district court denying the motion for a new trial.[15]

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[14] Judge Van Dusen suggests that the failure of the court to specifically state that the Government's remarks should have been ignored requires reversal. The district court, however, faced with a motion for a mistrial might very well have concluded that the Synod would be better protected without restating the remarks. In any event, the court explicitly stated that the jury could find for the Synod even if the properties were operated for a religious purpose.

[15] I do not discuss the Synod's other appellate contentions specifically, because I dissent. I note, however, that I believe them without merit. After carefully reviewing the record, I also believe that substantial evidence supports the jury's verdict denying application of the substitute facilities doctrine. Judge Muir, who heard the motion for a new trial, also concluded that substantial evidence supported the jury's verdict and that there was sufficient evidence to support at least a finding that the camps were "not reasonably necessary to the community."

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff

vs.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATE IN MONROE AND PIKE COUNTIES,
COMMONWEALTH OF PENNSYLVANIA, AND
SOUTHEASTERN PA. SYNOD OF
LUTHERAN CAMP OF AMERICA,
Defendants

Civil No. 70-240S

Complaint Filed 6/15/76
Reassigned 10/1/76

(JUDGE MUIR)

Tracts 1500, 2122 and 2132

APPEARANCES:

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For Southeastern Pa. Synod of Lutheran Camp of America	JOSEPH C. KREDER, ESQ. Scranton Electric Bldg. Scranton, Pa. 18503
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff

vs.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATE IN MONROE AND PIKE COUNTIES,
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(JUDGE MUIR)

Tracts 1500, 2122 and 2132

OPINION

MUIR, District Judge.

The United States, as a part of the Tocks Island Recreational Area Project, filed an action in condemnation of three recreational camps which were owned by the Southeastern Pennsylvania Synod of the Lutheran Church in America (the Synod). This case was assigned to Judge Sheridan who during pretrial proceedings held that the cost of substitute facilities was not a proper measure of compensation for the taking of the Synod's property. This ruling was appealed to the Court of Appeals which reversed, concluding that the substitute facilities doctrine could be applied to a non-governmental agency such as the Synod. The Court of Appeals expressed no opinion as to whether that doctrine applied in this case. 506 F.2d 796 (3d Cir. 1974).

The trial, which commenced on September 16, 1975, was bifurcated. The first part was devoted to the question of whether the substitute facilities doctrine applied to the camps owned by the Synod, and, if it did apply, what the Synod's just compensation under that doctrine would be. The applicability of the substitute facilities doctrine was submitted to the jury on September 30, 1975 by means of a special interrogatory. On the same day, the jury found that the substitution doctrine did not apply to the camps operated by the Synod and the Court proceeded to a determination of the value of the properties on the traditional market value theory. The jury returned a verdict in the amount of $740,000.

On November 14, 1975, the Synod filed a timely motion for a new trial. Because of the death of Judge Sheridan on August 23, 1976, this case was reassigned to the undersigned judge. The Synod seeks a new trial because it contends that the Court erred in refusing to declare a mistrial when counsel for the Government in his closing argument stated that the substitute facilities doctrine did not apply to a non-profit facility which was operated for spiritual profit and also seeks a new trial on the ground that the jury's answer to special interrogatory No. 1 was against the weight of the evidence.

The Synod contends that two statements made by counsel for the Government in his closing argument to the jury necessitate a declaration of mistrial. The first statement was:

> "On the question of being not for profit we concede they are a religious and charitable organization which was operating on a not for-monetary-profit. No question about it. But, is that the only kind of profit? Think about it. They were putting in operation the camp which was for the betterment of their religious teachings. Is that not a profit for religion? Mr. Dittman said, 'And if by chance some kid might be converted' Isn't that what they are there for . . . , Isn't that their mission? So, maybe they were operating not for monetary profit, but maybe for spiritual profit." (Tr. 743).

The next statement objected to is:

> "He said he visited Camp William Penn. I don't know if you recall that. It was just a short part of his testimony. He said that is a city run camp. It handles roughly the same number of children. The difference was, and here's your tip-off why this is not to be considered as a not for profit organization; he said, 'they had different goals.' Sure they did. They were there to take care of the children from the ghetto areas, period. They weren't there to promote their religion or any religious teachings or doctrines." (Tr. 754-755.)

The Synod contends that these two statements could have misled the jury as to the proper test to be used to determine if the camps were operated for a profit because the jury might have concluded that the camps were operated for profit if they were operated for "spiritual profit". Although the comments of Government counsel were obviously improper, the Court does not find them to constitute grounds for a mistrial for the reasons which are set forth below.

First, counsel for the Synod failed to object to the improper statements until he had finished his own summation to the jury. Unless manifest injustice results, failure to raise an objection to a statement at the time it is made constitutes the waiver of that objection. *Hyman vs. Life Insurance Company of North America*, 481 F.2d 441 (5th Cir. 1973); *Sanders vs. Mayo Clinic*, 485 F.2d 221 (8th Cir. 1974). No manifest injustice occurs in this case by requiring that counsel to the Synod raise timely objections. In a lengthy and complicated jury trial such as this one it is essential that objections be made in a timely fashion so that the Court can dispose of them without imposing an undue burden on judicial facilities and resources.

Second, the counsel for the Synod had the opportunity to rebut these remarks in his own closing statement.

Third, Judge Sheridan in his charge to the jury instructed that the statements of counsel were not evidence but merely attempts to persuade and that the jurors could not base a verdict upon any other view of the law than that given in the charge. (Tr. 788, 795, 796). In addition, the Court stated that the jury could find that the substitute facilities doctrine applied if the camps were operated on a not-for-profit basis for religious purposes, had no ready market, and were fulfilling a community need or purpose. (Tr. 798). Thus, the jury was clearly instructed that the mere fact that the camps were operated for a religious purpose did not preclude a finding that they were non-profit. In Lewis vs. Penn Central Company, 459 F.2d 468 (3d Cir. 1972), the Third Circuit Court of Appeals found no grounds for a mistrial in a factual situation similar to the one existing here. In that case, counsel for the railroad in his closing argument contended that a former employee's claim that he was permanently disabled did not jibe with the fact that the employee had quit his desk job for some unexplained reason and although claiming to be destitute, had run for political office and had a child in college. Even though the Court concluded that this statement was not proper, it held that the District Court's denial of a motion for a mistrial was not an abuse of discretion where counsel for the former employee was permitted to rebut any impropriety and the Court instructed the jury that arguments must be founded on testimony. See Pitchford vs. Pip, Inc., 531 F.2d 92 (3d Cir. 1975); Cf. United States of America ex rel. Andrew Perry vs. Mulligan, No. 75-2332 (3d Cir. 11/15/76), at 13.

In the light of the foregoing, the Synod's motion for a new trial based on allegedly improper statements by Government counsel will be denied.

The Synod also seeks a new trial because it claims that the verdict of the jury as to the application of the substitute facilities doctrine was against the weight of the evidence. According to the Synod, there is no legally sufficient evidence to support the jury's finding that the Synod did not establish the four factors required for the application of the substitute facilities test. Specifically, the Synod contends that there was no legally sufficient evidence introduced at trial to support a finding (1) either that the three Lutheran camps were operated for profit, or (2) that they were not unique, or (3) that there was a ready market available for the three camps, or (4) that their continued operation was not reasonably necessary to the community. The Synod maintains that any such finding by the jury on one or more of the factors is contrary to the weight of the evidence.

Before determining the validity of these contentions, the proper standard to be used by the Court must be set forth. In Lind vs. Schenly Industries, Inc., 278 F.2d 79 (3d Cir. 1960), cert. den. 364 U.S. 835 (1960), the Court stated that when the trial judge grants a new trial because the verdict is against the weight of the evidence, he negates the jury's verdict to some extent, substituting his own judgment as to the facts. Thus, the Court should exercise a closer degree of scrutiny in granting a new trial on the ground that the verdict is against the weight of the evidence than in granting a new trial because of some undesirable or pernicious influence intruding into the trial. Id. at 90. If the evidence on the record is sufficient to support the verdict, a new trial is not warranted merely because the jury could have reached a different result. Gebhardt vs. Wilson Freight Forwarding Company, 348 F.2d 129, 133 (3d Cir. 1965); Hourston vs. Harvlon, Inc., 457 F.2d 1105 (3d Cir. 1972); Lewin vs. Metropolitan Life Insurance Company, 394 F.2d 608 (3d Cir. 1968). The verdict winner, in this case the Government, is entitled to all of the inferences that may reasonably be drawn from the evidence. Milliron vs. Baker, 352 F.Supp. 495, 497 (W.D. Pa. 1973).

Where a trial has been long or involves a subject that is complicated and remote from ordinary jury's experience, the trial court should examine the verdict more closely than it would one where the issues involved essentially credibility. Lind vs. Schenley Industries, Inc., supra, at 91. The value of summer camps is obviously remote from an ordinary juror's experience. The Court will apply the more stringent test. Since the Synod did not object to Judge Sheridan's charge concerning the requirements of the substitute facilities doctrine, those instructions are the standard which the evidence must meet in this case. Because the jury was only asked to determine if the substitute facilities doctrine applied, if the evidence is sufficient to support a finding against the Synod on any one of the four requirements for the substitution doctrine, the jury's verdict must be sustained.

The Court concludes that there was sufficient evidence to support at least a finding that the camps were not reasonably necessary to the community. Dr. James, the President of the Southeastern Pennsylvania Lutheran Synod, testified that enabling a young person to have a camp experience helps him grow in his love of God and country as he spends time in the outdoors. (Tr. pp. 25, 26.) Pastor Gulliford, Executive Director of the camp corporation which is responsible for running the three camps, testified that the camp program attempted to bring children from different backgrounds together and teach them about each other. Although Dr. James and Pastor Gulliford attempted to establish the value of the camping programs, it is quite possible that the jury rejected their conclusions. In addition the jury could have determined that although a camping program benefits the community, *it is not reasonably necessary to that community.*

The Administrator of the camp program for the Philadelphia Area Masons testified that without the Synod camps his programs would be in dire straits. He seemed to take the position that the alternative to placing his campers in this Synod program was for the Masons to operate their own facility. (Tr. 191.) This testimony is not so convincing that a reasonable juror was compelled to conclude that the camps were reasonably necessary to the community. For instance, the jury could have determined that other available facilities can absorb the Masons' campers.

Pastor Neumeyer of the Center City Federation of 23 Intercity Parishes in Philadelphia stated that his organization operated in an area severely affected by a gang problem and depended upon sending certain boys who were being pressured to join gangs to the camps for the summer. Asked why camps run by the city would not be an adequate substitute to the Synod's program, he replied that "mostly they are not as suitable because they are almost totally black and deny us the interracial aspects." (Tr. 174). Certainly the jury could have concluded that the integrated camps of the Synod were not necessary when adequate facilities, the city camps, already existed. Out of the 3,000 children whom the Synod camps accommodated in the summer of 1970, 92 were underprivileged. Various civic groups paid the price for the campers. Although a discount was given to some of these children, it was usually not very substantial. In 1972 the three camps accommodated several mentally retarded children from White Haven. Twenty-two emotionally disturbed children from the Silver Spring Institution were allowed to attend the three camps, but this program was discontinued because these children could not be handled in the relatively free atmosphere of the camps. Based on the above testimony, the jury could have reasonably determined that these three camps were not a necessity to the community. They could have found that other programs like those run by the city mentioned above could accommodate the children just as well. In addition, the jury could have concluded that the continued existence of a camp for middle class children was not reasonably necessary to the community. Reasonable people may differ as to the value to the community of a camp. The Court will not invade the function of the jury by substituting its analysis of the needs of the community for that of the members of the jury.

Since there is sufficient evidence to support a determination by the jury that the three camps were not reasonably necessary to the public, there is no need for the Court to consider whether the jury's finding that the Synod has failed to prove the other three factors of the substitute facilities doctrine is against the weight of the evidence. In the light of the foregoing, the Synod's motion for a new trial will be denied.

MUIR, U.S. District Judge

DATED: December 8, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 74-1502.

UNITED STATES OF AMERICA,
Appellee,

v.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATE IN MONROE AND PIKE COUNTIES,
COMMONWEALTH OF PENNSYLVANIA, AND
BENEDICT F. PASTORINI, ET AL.

APPEAL OF SOUTHEASTERN PENNSYLVANIA
SYNOD OF THE LUTHERAN CHURCH
IN AMERICA

Argued Oct. 21, 1974.

Decided Dec. 30, 1974.

Appeal from the United States District Court, Middle District of Pennsylvania; (D.C. No. 70-240 Civil).

Wallace H. Johnson, Asst. Atty. Gen., Peter A. Ruvolo, Carl Strass, Lawrence E. Shearer, Attys., Dept of Justice, Washington, D. C., for appellee.

H. Ober Hess, Peter M. Mattoon, John V. Bonneau, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa., for appellant Southeastern Pennsylvania Synod of the Lutheran Church in America.

Joseph C. Kreder, Warren, Henkelman, McMenamin & Kreder, Scranton, Pa., for appellants.

BEFORE HASTIE, GIBBONS AND WEIS, *Circuit Judges.*

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This interlocutory appeal which the district court certified involves a controlling question of law as to which there is a substantial ground for a difference of opinion. The appeal was permitted by this Court pursuant to 28 U.S.C. § 1292(b). The order appealed from arose in an action by the United States for the condemnation of three recreational camps in the proposed Tocks Island recreational area which were owned and operated on a not-for-profit basis by or on behalf of the Southeastern Pennsylvania Synod of the Lutheran Church in America. The land and improvements, according to the owner, have a special character designed specifically for camping purposes.

The order under review was entered during pretrial proceedings on the government's request for a ruling that the cost of "substitute facilities" is not a proper measure of compensation for the taking of defendant's property, and that evidence at the trial should be restricted to fair market value as of the date of taking, or if that measure is unavailable, to depreciated replacement cost of the properties as improved on that same date. The district court held that the cost of substitute facilities measure of compensation was available only to a governmental condemnee. However, recognizing that if its ruling was in error a fruitless trial might result, the trial court certified the case for an interlocutory appeal on that issue. We reverse.

Appellant Southeastern Pennsylvania Synod of the Lutheran Church in America owned and operated three summer camps located on three separate tracts totaling 305.81 acres along the Delaware River in Monroe County, Pennsylvania. On June 15, 1970 the United States acquired the three camps by filing a notice of taking, and has offered compensation totaling $485,400. The condemnees have offered to prove that the camps have been operated on a nondenominational basis for many years at continuous losses, which losses have been underwritten by the Synod; that there is no ready market for such not-for-profit facilities; that by virtue of grandfather clauses in the Pennsylvania legislation governing recreational camps the Synod could have continued operating the camps with their present somewhat primitive facilities; that because of the same legislation as well as recently enacted federal

environmental legislation the development of new camps would require far more elaborate facilities, especially for housing and sewage treatment; and that the cost of development of the new site will total in excess of $5.8 million. At this stage of the case there has been no ruling as to whether all of the items of cost included in appellant's $5.8 million estimate would actually be needed for the development of substitute facilities, but it is undisputed that $485,000 would fall for short of providing them.

Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission. Thus the question presented is the extent to which owners of single purpose facilities, operated not-for-profit for a religious or charitable purpose (and having no ready market) are entitled to be indemnified when the federal government condemns the facilities. A closely analogous case would be the condemnation of an ancient church building still in active use for religious purposes.

[1]Recently Justice Rehnquist wrote for the Court:

> "Our prior decisions have variously defined the 'just compensation' that the Fifth Amendment requires to be made when the Government exercises its power of eminent domain. The

owner is entitled to air market value, United States v. Miller, 317 U.S. 369, 374, 63 S.Ct. 276, 87 L.Ed. 336 (1943), but that term 'is not an absolute standard nor an exclusive method of valuation.' United States v. Virginia Electric & Power Co., 365 U.S. 624, 633, 81 S.Ct. 784, 790, 5 L.Ed.2d 838 (1961). The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950), as it does from technical concepts of property law." United States v. Fuller, 409 U.S. 488, 490, 93 S.Ct. 801, 803, 35 L.Ed.2d 16 (1973). *See also* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 478, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973). The basic principle underlying the constitutional requirement of "just compensation" is one of indeminity.[1] The condemnee "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but he is entitled to no more." Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934).

[2,3] If the government condemns property for which there is a ready market (commodities are a classic example) payment of the fair market value is complete indemnity since, whatever its intended use, the condemnee can readily replace it in the marketplace. Some property, however, from its very nature, has no marketplace. An example is a single purpose faicility requiring a large capital investment, such as a power generating station. Such facilities usually are operated for profit. When they cannot be valued in the marketplace a fair measure of the government's obligation to indemnify may be the present value of capitalized future earnings. Presumably the investors in a single purpose facility operated for profit will be able to take their capital investment, valued on the basis of the capitalized earning capacity of the facility in which they invested, and put to another use. Finally, there are facilities which are unique, for which there is no ready market, and which are operated for motives other than profit. With respect to such facilities, neither a fair market value nor a capitalized earnings approach as the measure of the government's constitutional duty to indemnify will produce a fair result.

[4] With respect to some unique facilities it may be possible to afford just compensation by calculating depreciated replacement cost to arrive at an approximation of otherwise unavailable proof of market value. For others, however, such a measure will not be fair. Typical of facilities which simply cannot be valued in the marketplace, or by capitalized earnings, or by depreciated replacement cost, are those erected for common public purposes by states or their public subdivisions; roads for example. Fair indemnification in such circumstances requires compensation sufficient to provide a substitution for the

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[1] Congress, in providing a mechanism for the government's exercise of eminent domain, has adopted the language of the fifth amendment's taking clause. The government's declaration of taking must contain to the owner in fee "[a] statement of the sum of money estimated by said acquiring authority to be *just compensation* for the land taken." 40 U.S.C. § 258a (emphasis supplied).

unique facilities so that the functions carried out by or on behalf of members of the community may be continued. Depreciated replacement cost often will not permit continuation of such functions. To meet the requirement of fair indemnification for the taking of community facilities the courts have developed the "substitute facilities" measure of compensation.

[5] There has been a certain amount of confusion in the literature on condemnation with respect to use of the "substitute facilities" terminology as a measure of "valuation" rather than of "fair compensation." It should be apparent that the cost of substitute facilities in most instances will have no relationship to "valuation." Indeed, the Second Circuit in United States v. Certain Property, 403 F.2d 800, 803 (2d Cir. 1968), and the Ninth Circuit in California v. United States, 395 F.2d 261, 266 (9th Cir. 1968) have made it clear that even in those comparatively rare instances where there is a market value for the community facility taken (for example a possible sale of a public building for private use) the government's duty to indemnify is to provide the cost of a more expensive public substitute facility. The difference between the market value in a private use market, and the cost of a public substitute facility often will result from the fact that more stringent building codes will apply to the new public facility even though the old might have continued in use. The community entity is entitled to be made whole, and making it whole means more than forcing it to abandon its non-profit community use and accept what it could obtain in the marketplace from a profit motivated purchaser. Simply stated this method insures that sufficient damages will be awarded to finance a replacement for the condemned facility. Nothing less would afford just compensation. And since the owner of a facility devoted to a non-profit, public use has a proprietary as well as a community interest in it, if the fair market value exceeds the cost of the substitute facility, such an owner should be entitled to the higher of the two measures of compensation.

[6] The government urges that no operator of a public non-profit facility other than a governmental entity under a legal obligation to replace a condemned facility should be entitled to indemnification to the extent of the substitute facilities measure of just compensation. *See, e. g.*, United States v. Wheeler Township, 66 F.2d 977, 985 (8th Cir. 1933); *cf.* United States v. Certain Lands, 246 F.2d 823, 824 (3d Cir. 1957). But such a holding would produce the anomalous result that the federal government's fifth amendment duty of fair compensation, which would seem to be equally applicable throughout the country, would vary according to the vagaries of local law. We prefer the approach of the Second Circuit, which recognizes that the decision to replace a facility may involve discretionary determinations as to community need, and that fair compensation for a structure reasonably necessary to public welfare means "compensation ... measured not in terms of 'value' but by the loss to the community occasioned by the

condemnation." United States v. Certain Property, *supra*, 403 F.2d at 804.

The government also urges that the substitute facilities measure of just compensation is totally inapplicable to any condemnee other than a governmental entity. This position was accepted by the district court. No Supreme Court or court of appeals decision has ever considered that issue. Those federal cases which have applied the substitute facilities measure all have involved governmental condemnees.[2] A leading state court case which considered the condemnation of privately owned non-profit community facilities held that the substitute facilities measure of just compensation is equally applicable to these private facilities as to those operated by a governmental unit. Newton Girl Scout Council Inc. v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956); *cf.* Pleasant Hill v. First Baptist Church, 1 Cal.App.3d 384, 397 n. 1, 82 Cal.Rptr. 1, 7 n. 1 (Ct.App.1969); First Baptist Church v. Nebraska, 178 Neb. 831, 135 N.W.2d 756 (1965); Assembly of God Church v. Vallone, 89 R.I. 1, 150 A.2d 11, 15-16 (1959); Jahr, Eminent Domain §§ 83-84, at 117-18 (properties of non-profit organizations); Note, 37 B.U.L.Rev. 495 (1957).

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[2] *E.g.*, United States v. Certain Property, 403 F.2d 800 (2d Cir. 1968); United States v. Certain Land, 346 F.2d 690 (2d Cir. 1965); United States v. Bd. of Educ. of Mineral County, 253 F.2d 760 (4th Cir. 1958); United States v. Certain Lands, 246 F.2d 823 (3d Cir. 1957); State of Washington v. United States, 214 F.2d 33 (9th Cir. 1954); City of Forth Worth v. United States, 188 F.2d 217 (5th Cir. Auth., 146 F.2d 564 (6th Cir. 1945). *See generally*, Note, Just Compensation and the Public Condemnee, 75 Yale L.J. 1053 (1966).

[7] For several reasons we think the government's position with respect to private owners of non-profit community facilities is untenable. In the first place we are dealing with the measure of the duty of indemnification imposed by the "taking clause" in the fifth amendment:

> "nor shall *private* property be taken for public use, without just compensation." (emphasis supplied).

In view of the express reference to *private* property and the absence of any reference to public property, it is inconceivable that the framers of the amendment intended to impose a greater obligation of indemnification on the national government toward the states and their subdivisions than toward private owners. One might argue that the reference to "private" property in the fifth amendment's taking clause, and in the almost universal state constitutional clauses limiting the eminent domain power,[3] means that the clause simply was not intended to protect "community" rather than private values. But we have long since passed that point, and the government concedes that it must pay substitute facilities values when it condemns community facilities owned by a governmental entity. We are not dealing with congressional largess toward governmental entities, which might justify a distinction between the measure of fair compensation for governmental and for non-governmental community facilities. Rather we are dealing with judicial interpretation of the taking clause. Accepting the interpretation that it protects the value of community uses, there is no basis for distinguishing between governmental and private community uses. Moreover acceptance of the appellee's position would inevitably put the government in a posture in which, for economic reasons, it would be forced into unfortunate and possibly discriminatory choice-of-location decisions. One can envision for example, the choice between a highway route traversing land occupied by a private or a public university; the condemnation for emergency office use of a parochial school or a public school; the destruction of a church rather than a city hall to permit the building of a federal courthouse. It seems to us an impermissible suggestion that the fifth amendment puts the government in the position of making such choices on the basis that it would be required to pay less by way of fair compensation to he private owners of such community facilities.[4]

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[3] 1 Nichols on Eminent Domain § at 1 78 to 1-83 (rev. third ed. 1974).

Finally, we note that in Brown v. United States, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923), a case upholding the constitutionality of a statute which authorized the government to condemn additional land adjacent to land to be flooded by a dam and reservoir project as a substitute site for the purpose of relocating the town of American Falls, Idaho, the Court said:

> "A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole." 263 U.S. at 82-83, 44 S.Ct. at 94.

No distinction was drawn in Brown v. United States between public and private owners. All were to be relocated in substitute facilities. Although the holding deals with condemnation for the purpose of making the substitution, the case is frequently cited as the genesis of the substitution of facilities method of measuring fair compensation. *See, e.g.*, United States v. Certain Property, 403 F.2d 800, 803 (2d Cir. 1968).

[8,9] We conclude that the substitution of facilities measure of fair compensation is available to private owners of non-profit community facilities as well as to public owners of such facilities, in appropriate cases. In the preliminary stage in which the case is before us we have no occasion to decide whether this is an appropriate case.

The order appealed from will be reversed.

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[4] Such an interpretation of the fifth amendment would have first amendment overtones. *See generally*, Comment, The Lord Buildeth and the State Taketh Away—Church Condemnation and the Religion Clauses of the First Amendment, 46 Colo.L.Rev. 43 (1974).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1238

UNITED STATES OF AMERICA

vs.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATED IN MONROE AND PIKE COUNTIES,
COMMONWEALTH OF PENNSYLVANIA, AND
BENEDICT F. PASTORINI, ET AL.
SOUTHEASTERN PA. SYNOD OF LUTHERAN
CAMP OF AMERICA,

Southeastern Pa.
Synod of Lutheran
Camp of America,
Appellant

(D. C. Civil No. 70-240)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PRESENT: ROSENN AND VAN DUSEN, *Circuit Judges*
AND STERN, *District Judge*[*]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on October 21, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the order/judgment of the said District Court, dated December 8, 1976, be, and the same is hereby reversed, and the cause remanded for a new trial in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST: /s/ Thomas F. Quinn

Clerk

March 27, 1978

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[*] Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1238

UNITED STATES OF AMERICA

vs.

564.54 ACRES OF LAND, MORE OR LESS,
SITUATED IN MONROE AND PIKE COUNTIES,
COMMONWEALTH OF PENNSYLVANIA, AND
BENEDICT F. PASTORINI, ET AL.
SOUTHEASTERN PA. SYNOD OF
LUTHERAN CAMP OF AMERICA,

SOUTHEASTERN PA. SYNOD OF
LUTHERAN CAMP OF AMERICA, *Appellant*

(D.C. Civil No. 70-240
Tracks No. 1500, 2122 & 2132)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, VAN DUSEN,
ADAMS, GIBBONS, ROSENN, HUNTER, WEIS,
GARTH and HIGGINBOTHAM, *Circuit Judges*,
and STERN, *District Judge**

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: May 24, 1978

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* Honorable Herbert J. Stern, United States District Judge, sitting by designation.

Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-488

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 21, 1978
CERTIORARI GRANTED NOVEMBER 27, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-488

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE

1970

June 15—COMPLAINT—in condemnation and demand for trial by jury.

June 15—DECLARATION OF TAKING—

June 15—NOTICE—of condemnation

June 15—PETITION—for order for delivery of possession.

June 15—ORDER—for delivery of possession. (N)

June 6—CERTIFICATE—of Clerk, acknowledging receipt of check #104,87 in the sum of $893,000.00 for deposit in the Registry of the Court, representing estimated compensation.

1972

Dec. 15—PLAINTIFF'S MEMORANDUM—in support of pre-trial rulings.

PLAINTIFF'S REQUEST—for pre-trial rulings

Dec. 15—PLAINTIFF'S MEMORANDUM—re substitute facilities as measure of damage Trs. 1500, 2122 & 2123

1973

Jan. 31—AFFIDAVITS—NO TRACT SPECIFIED WERE SEVERAL MENTIONED—of Rev. Dr. William A. Janson.

June 22—ORDER—Tr. 1500, 2122, 2132—Plaintiff having filed a request for pre-trial rulings, and the Court having heard oral argument and having considered the briefs of counsel,

It is ORDERED that Tuesday, August 14, 1973 at 2:00 P.M. at Harrisburg, Pa. is fixed as the time and place for oral argument and the submission of evidence on the following issues:

DATE

1973

1. The loss of protection of a grandfather's clause and the impact on substituted facilities of regulatory requirements of the Commonwealth of Pennsylvania and any agency of political subdivision thereof.
2. The public features of the defendants facilities as argued in defendant's memorandum. (S)

Copies to counsel of record.

Jan. 15—MEMO & ORDER—(Tr. 1500, 2122, 2132)—It is Ordered that;

1. The cost of substitute facilities is not a proper measure of compensation for the taking of defendant's property.
2. All other rulings relative to the valuation standard or standards to be applied are reserved. (S)

Copies to Atty Peter M. Mattoon, and U.S. Atty and Atts Charles MacMullan and Peter H. Ruvolo and Joseph C. Kreder, Esq.

1974

March 11—ORDER—(Tr. 1500, 2122, 2132)—Defendant, Southeastern Pennsylvania Synod, having submitted a letter dated January 22, 1974, requesting that the court's order of January 15, 1974, "be amended to include a Section 1292(b) certification. 28 U.S.C. 1292(b)," and it appearing that the propriety of the substitution standard of valuation involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It is ORDERED that

1. The letter of January 22, 1974, from defendant, Southeastern Pennsylvania Synod, is considered as a motion to amend the court's order of January 15, 1974, to include a Section 1292(b) certification, 28 U.S.C. & 1292(b);

DATE

1974

2. The motion is granted.

It is FURTHER ORDERED that the court's order of January 15, 1974, in the abovc captioned matter is hereby amended by adding thereto the following paragraph:

"3. It is hereby CERTIFIED pursuant to 28 U.S.C. & 1292(b) that the propriety of the substitution standard of valuation involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination on the litigation." (S)

Copies to counsel of record.

Apr 24—AFFIDAVIT—of John J. Levkulic. (Originally filed with the Court on Aug. 14, 1973)

AFFIDAVIT—of Rev. Roy E. Gulliford. (Originally filed with the Court on Aug. 14, 1973)

APPELLANT'S—Trs. 1500, 2122, 2132—Southeastern Pennsylvania Synod of the Lutheran Church in America, designation of the Record for Appeal.

1975

Jan. 13—COURT OF APPEALS OPINION—(Filed 12-30-74) Reversing the judgment of the District Court entered on 1-15-73.

June 12—AMENDED JUDGMENT—(Certified Copy) (Trs. 1500, 2122 & 2132)—from U.S. Court of Appeals that the order of the District Court filed January 15, 1974, as amended by order dated March 11, 1974, be, and the same is hereby reversed. Each party shall bear his own costs, and

June 12—ORDER—(Certified copy)—from U.S. Court of Appeals. The appellee's Petition for Modification of December 30, 1974 Opinion or for Rehearing before the original panel is denied.

DATE

1975

The Judgment of the court is hereby modified to provide that each party will bear his own costs. (Gibbons)

Copy of Opinion attached thereto.

June 12—Copy of Amended Judgment and Order mailed to Judge Sheridan.

Documents Nos. 1, 2, 5, 17, 19, 21, 82, 85, 90, 92, 108, 120, 122, 125, 126 and 127 Pertaining to Tracts 1500, 2122 and 2132 mailed to W-B.

Sept. 30—SPECIAL INTERROGATORIES—(Tr. 1500, 2122, 2132)—Jury found that Doctrine of Substitute Facilities does not apply.

Sept. 30—MINUTE SHEET (9th day)—(Tr. 1500, 2122, 2132)—Synod moves for withdrawal of jury and/or mistrial. DENIED. Jury Verdict received (Special Interrog) and Jury polled. (S)

Oct. 3—VERDICT—Tr. 1500, 2122, 2132—We, the jury, find in favor of Southeastern Pa. Synod of Lutheran Camps of America and award the following:

Tr. 1500—Camp Miller—$250,000.00

Tr. 2122—Camp Ministerium—$300,000.00

Tr. 2132—Camp Hagan—$190,000.00

Nov. 5—JUDGMENT ON VERDICT—(Tract 1500)—Ordered that judgment be entered in favor of Southeastern Pa. Synod of Lutheran Camps of America and against U.S.A. in sum of $250,000.00. The sum of $186,000.00 having been deposited, there remains to be deposited the sum of $64,000.00 with int. thereon at rate of 6% per annum from 6/15/70 until date of deposit. (S)

Copies to counsel of record, from Hbg.

DATE

1975

Nov. 5—JUDGMENT ON VERDICT—(Tract 2122)—Ordered that judgment be entered in favor of Southeastern Pa. Synod of Lutheran Camps of America, and against the U.S.A. in sum of $300,000.00. The sum of $210,000.00 having been deposited into Registry of Court the sum of $90,000.00 together with int. thereon at rate of 6% per annum from 6/15/70 until date of deposit. (S)

Copies to counsel from Harris.

Nov. 5—JUDGMENT ON VERDICT—(Tract 2132)—Ordered that judgment be entered in favor of Southeastern Pa. Synod of Lutheran Camps of America and against the U.S.A. in sum of $190,000.00. The sum of $144,000.00 having been deposited into Registry of Court, the remains to be deposited into registry the sum of $46,000.00 together with int. thereon at rate of 6% per annum from 6/15/70 until date of deposit. (S)

Copies to counsel from Harris.

Nov. 14—MOTION—of Condemnee, Southeastern Penna. Synod of the Lutheran Church In America, for New Trial, and

Nov. 14—CERTIFICATE—of service thereof.

1976

Dec. 8—OPINION—of Judge Muir, and

Dec. 8—ORDER—(Tracts 1500, 2122 and 2132)—Church in America's motion for a new trial is denied. (M)

Copies to all counsel of record.

1977

Jan. 11—APPEAL—Tr. 1500, 2122, and 2132 (filing fee paid) —of Defendant Southeastern Pa. Synod of Lutheran Camp of America from Order of 8th day of Dec., 1976, denying deft's. motion for a new trial, and Bond for Costs in sum of $250.00.

DATE

1977

Jan. 19—RECORD ON APPEAL—mailed to the U.S. Court of Appeals.

1978

Apr. 25—OPINION—of U.S. Court of Appeals dated 3/27/78 .... "The order of the district court denying the Synod's motion for a new trial will be reversed and the case remanded for a new trial in accordance with this opinion. (Judge Van Dusen) ...." However, because I am bound by the holding in 564.54 acres I, and because under the holding of that case as elucidated by Judge Van Dusen, I do not believe the litigants got a fair trial, I join Judge Van Dusen in Parts I, II and III of his opinion and I vote to reverse." (Concurrence by Judge Stern) and,

"I respectfully dissent to the remand of this case for another trial because I believe first that the jury charge given by the presiding judge, the late Chief Judge Sheridan, faithfully adhered to the principles of law enunciated by us in U.S. vs. 564.54 Acres of Land I, 506 F.2d 796 (3d Cir. 1974) concerning condemnation of public facilities owned by a nonprofit property owner, and that no party objected to the instructions; second, that the errors, if any, in the charge were minimal and nowhere near the magnitude of fundamental error; and third, that any possible misstatement of the law by the Government in its closing remarks was specifically cured by the trial judge", and I would therefore affirm the judgment of the district court denying the motion for a new trial. (Dissent by Judge Rosenn)

June 5—J.S. 5—case reopened

June 6—CASE FILE—returned from US Ct of Appeals. Judgment 4-25-78

DATE

1978

June 6—DOCKETING LETTER—and

CERT. COPY OF JUDGMENT—from Ct of Appeals (No. 77-1238 C.A.), Ordered and Adjudged that the Order of the Dist. Ct., dated 12/8/76, be and the same is hereby reversed, and the cause remanded for a new trial in accordance with the opinion of this Court. Costs taxed against appellee. (Rosenn and Van Dusen, and Stern) Certified as a true copy and issued in lieu of a formal mandate on June 1, 1978. (Total costs taxed $539.15) (Costs taxed in favor of appellant) Wm 6-5-78

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

Certified from the record

Date—6/16/70

T. H. Campion
Clerk

Per—/s/ [Illegible]
Deputy Clerk

United States of America, plaintiff

vs.

564.54 Acres of Land, More or Less, Situate in Monroe and Pike Counties, Commonwealth of Pennsylvania, and Benedict F. Pastorini, et al., defendants

DECLARATION OF TAKING

TO THE HONORABLE,
THE UNITED STATES DISTRICT COURT:

I, Stanley R. Resor, Secretary of the Army of the United States of America, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), July 18, 1918 (40 Stat. 911, 33 U.S.C. 594), and August 18, 1941 (55 Stat. 650, 33 U.S.C. 701c-2), which authorize the acquisition of land for flood control projects; the Act of Congress approved October 23, 1962 (Public Law 87-

874), which act authorizes the development of the Delaware River Basin; the Act of Congress approved September 1, 1965 (Public Law 89-158), which act authorized the establishment of the Delaware Water Gap National Recreation Area, Pennsylvania and New Jersey, as part of the Tocks Island Reservoir Project; and the Acts of Congress approved October 29, 1969 (Public Law 91-98) and December 11, 1969 (Public Law 91-144) which acts made funds available for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for a national recreation area in the Delaware River Basin and for other uses incident thereto. The said land has been selected by me for acquisition by the United States for use in connection with the establishment and use of the Delaware Water Gap National Recreation Area, as part of the Tocks Island Reservoir Project, Pennsylvania and New Jersey, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estate taken for said public uses is the fee simple title to the land described in Schedule "A", subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Stanley R. Resor, Secretary of the Army, this 21st day of May A.D. 1970, in the City of Washington, District of Columbia.

/s/ Stanley R. Resor
Secretary of the Army

SCHEDULE A

The land which is the subject matter of this declaration of taking aggregates 564.54 acres in Monroe and Pike Counties, Commonwealth of Pennsylvania. A description of the land taken, together with the names and addresses of the purported owners thereof and a statement of the sum estimated to be just compensation therefor, are as follows:

TRACT NO. 904

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Smithfield, and more particularly bounded and described as follows:

Beginning at a corner common to the lands of the subject owner and the lands now or formerly of Frank LeBar, et al, being a point in the southerly right of way line of Mohawk Street, as shown on Map of Hi-a-le-ah Park, Smithfield Township, Monroe County, Pennsylvania, dated 1944, and filed for record in Plat book 8, Page 160 in the records of Monroe County, Pennsylvania, the said point being further located South 85° 55′ East 1378 feet, more or less, from the intersection of the centerline of Pennsylvania Legislative Route Number 45012 with the centerline of Cedar Street; thence, from the said point of beginning, and with the lands of the said LeBar, et al, and with the said southerly right of way line of Mohawk Street,

(1) North 85° 23′ East 102 feet to a corner common to the lands of the said subject owner and the lands now or formerly of American Land, Inc.; thence, leaving the lands of the said LeBar, et al, and leaving the southerly right of way line of the said Street, and with the lands of the said American Land, Inc.,

(2) South 23° 34′ East 241 feet, more or less, to a point at the mean low water mark of the Delaware River; thence, leaving the lands of the said American Land, Inc., and with the mean low water mark of the said River, downstream,

(3) In a generally southwesterly direction, approximately 97 feet to a corner common to the lands of the said subject owner and the lands of the said LeBar, et al; thence, leaving the mean low water mark of the said River, and with the lands of the said LeBar, et al,

(4) North 23° 34′ West 261 feet, more or less, to the place of beginning, containing 0.56 acre, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone), 1927 N.A. Datum.

It is the intent of the foregoing description to include the same land as that described in a deed from Detleff A. Hansen and Lorene A. Hansen, his wife, to Benedict F. Pastorini and Viola E. Pastorini, his wife, dated May 29, 1958 and filed for record June 2, 1958 in Deed Book 243, Page 111 in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS

Benedict F. Pastorini and
Viola E. Pastorini, his wife
210 Sixth Avenue
New York, New York

ESTIMATED JUST COMPENSATION $28,000.00

TRACT NO. 908

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Smithfield, and more particularly bounded and described as follows:

Beginning at a corner common to the lands of the subject owner and the lands now or formerly of Walter S. Wyckoff, et ux, and at a point in the line of the lands now or formerly of Frank LeBar, et al, being a point in the southerly right of way line of Mohawk Street, as shown on Map of Hi-a-le-ah Park, Smithfield Township, Monroe County, Pennsylvania, dated 1944, and filed for record in Plat Book 8 Page 160 in the records of Monroe County, Pennsylvania, the said point being further located South 83° 40′ East 882 feet, more or less, from the intersection of the centerline of Pennsylvania Legislative Route Number 45012 with the centerline of Cedar Street; thence, from the said point of beginning, and with the lands of the said LeBar, et al, and with the southerly right of way line of the said Mohawk Street,

(1) North 76° 36′ East 108 feet to a corner common to the lands of the said subject owner and the lands now or formerly of Warren M. Wenner, et ux; thence, leaving the lands of the said LeBar, et al, and leaving the southerly right of way line of the said Street, and with the lands of the said Wenner, et ux, the following courses and distances:

(2) South 19° 39′ East 119 feet,

(3) South 23° 34′ East 204 feet, more or less, to a point at the mean low water mark of the Delaware River; thence, leaving the lands of the said Wenner, et ux, and with the mean low water mark of the said River, downstream,

(4) In a generally southwesterly direction, approximately 103 feet to a corner common to the lands of the said subject owner and the lands of the said Wyckoff, et ux; thence, leaving the mean low water mark of the said River, and with the lands of the said Wyckoff, et ux,

(5) North 23° 34′ West 310 feet, more or less, to the place of beginning, containing 0.73 acre, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone), 1927 N.A. Datum.

It is the intent of the foregoing description to include the same land as that described in:

(1) A deed from Warren M. Wenner and Dorothea M. Wenner, his wife, to Bonnie M. Bourne, dated April 3, 1952, and filed for record April 8, 1952, in Deed Book 184 Page 262.

(2) A deed from George Rowland Collins and Gladys Collins, his wife, to Bonnie M. Bourne, dated August 30, 1963, and filed for record September 24, 1963, in Deed Book 312 Page 519.

Both the above deeds are found in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESS OF PURPORTED OWNER

Bonnie M. Bourne
136 West 52nd Street
New York, New York

ESTIMATED JUST COMPENSATION $42,000.00

TRACT NO. 1120

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Smithfield and more particularly bounded and described as follows:

Beginning at a corner common to the lands of Salvatore Frank Pappalardo, et ux, the lands of Alfred Pappalardo Sr., et ux, and the lands of John S. Michael, said point being the beginning of the eleventh or South 16° 59′ East 578 feet, line of lands described in a deed from Alfred Pappalardo, Sr. and Mary Pappalardo, his wife to Salvatore Frank Pappalardo and Mary Edna Papparaldo, his wife, dated June 11, 1951 and filed for record in Deed Book 180, Page 165 in the records of Monroe County, Pennsylvania, said point being further located South 22° 20′ East 1630 feet, more or less, from the intersection of the centerline of Township Route Number 515 with the centerline of Township Route Number 538; thence, from said point of beginning and with the lands of the said Alfred Pappalardo, Sr.

(1) South 28° 08′ East, passing a corner common to the lands of said Pappalardo, Sr., and the lands of Frank B. Kober, et ux, at approximately 483 feet, in all 574 feet to a corner common to the lands of the said Salvatore Frank Pappalardo and the lands of Ludwig Hofstetter, et al; thence, leaving the lands of the said Kober, and with the lands of the said Ludwig Hofstetter

(2) South 62° 43′ West 230 feet to a corner common to the lands of the said Salvatore Frank Pappalardo, the lands of the said Ludwig Hofstetter and the lands of Anton Hofstetter; thence, leaving the lands of the said Ludwig Hofstetter and with the lands of the said Anton Hofstetter

(3) South 65° 43′ West, passing a corner common to the lands of the said Anton Hofstetter and the lands of Josie Pappalardo at approximately (illegible) 56 feet in all 236 feet to a corner common to the lands of the said Salvatore Frank Pappalardo and the lands of the said Jossie Pappalardo; thence, with the lands of the said Josie Pappalardo

(4) South 26° 45′ East, passing the Northerly right of way line of Pennsylvania Legislative Route Number 45012 at approximately 263.50 feet in all 279 feet to the center of the said Legislative Route Number 45012 and to a corner common to the lands of the said Salvatore Frank Pappalardo, the lands of the said Josie Pappalardo, and the lands of Albert E. Jochen; thence, leaving the lands of the said Josie Pappalardo and with the lands of the said Jochen and with the center of the said Legislative Route Number 45012

(5) South 76° 18′ West 46 feet to a corner common to the lands of the said Salvatore Frank Pappalardo, the lands of the said Jochen, and other lands of Alfred Pappalardo Sr.; thence, leaving the lands of the said Jochen and with the lands of the said Alfred Pappalardo, Sr. and continuing with the center of the said Legislative Route Number 45012

(6) South 70° 14′ West 219 feet to a corner common to the lands of the said Salvatore Frank Pappalardo, the lands of the said Alfred Pappalardo and the lands of Frank Pappalardo; thence, leaving the lands of the said Alfred Pappalardo and with the lands of the said Frank Pappalardo and continuing with the center of the said Legislative Route Number 45012

(7) South 73° 48′ West 244 feet to a corner common to the lands of the said Salvatore Frank Pappalardo, the lands of the said Frank Pappalardo and still other lands of the said Alfred Pappalardo Sr.; thence, leaving the lands of the said Frank Pappalardo and continuing with the center of the said Legislative Route Number

45012 and with the lands of the said Alfred Pappalardo Sr.

(8) South 81° 02′ West 173 feet to a corner common to the lands of the said Salvatore Frank Pappalardo and the lands of the said Alfred Pappalardo Sr.,; thence, leaving the center of the said Legislative Route Number 45012 and with the lands of the said Alfred Pappalardo Sr., the following courses and distances:

(9) North 27° 20′ West, passing the Northerly right of way line of the said Legislative Route Number 45012 at approximately 19 feet, in all 601 feet

(10) North 61° 37′ East, passing a corner common to the lands of the said Alfred Pappalardo Sr. and the lands of the Scranton Pocono Girl Scout Council at approximately 395 feet in all 814 feet, to a corner common to the lands of the said Salvatore Frank Pappalardo, the lands of the said Girl Scout Council and the lands of the said Michael; thence, leaving the lands of the said Girl Scout Council and with the lands of the said Michael

(11) North 47° 46′ East 322 feet to the place of beginning, containing 16.02 acres, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone) 1927 N A Datum.

The above described land is substantially the same land as that described in a deed from Alfred Pappalardo Sr. and Mary Pappalardo, his wife, to Salvatore Frank Pappalardo and Mary Edna Pappalardo, his wife, dated June 11, 1951 and filed for record June 11, 1951 in Deed Book 180, Page 165 in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES
OF PURPORTED OWNERS:

Salvatore Frank Pappalardo and
Mary Edna Pappalardo, his wife
R.D. #1
East Stroudsburg, Pennsylvania

Equitable Life Assurance Society
of the United States
New York, New York
Mortgagee

George A. Michael
Address unknown
Water Rights

Earl F. Robacher and
Mrs. Earl F. Robacher,
his wife
(first name unknown)
Address unknown
Private right of way

Unknown heirs and assigns of Earl F. Robacher and Mrs. Earl F. Robacher, his wife
(first name unknown)
Private right of way

ESTIMATED JUST COMPENSATION $23,500.00

TRACT NO. 1330

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Smithfield and more particularly bounded and described as follows:

Beginning at a corner common to the lands of Herbert Erickson, et ux, and the lands of John C. Kinsella, et al, and at a point on the easterly side of an unnamed street, said point being the beginning of the fourth or North 70° 08′ East 174.31 feet, line of lands described in a deed from Frank J. Young and Norma E. Young, his wife, to Herbert Erickson and Helen Mary Erickson, his wife, dated August 10, 1957 and filed for record in Deed Book 235, Page 686, in the records of Monroe County, Pennsylvania; thence, from said point of beginning, and with the lands of the said Kinsella

(1) North 58° 36′ East 175.5 feet to a point in the line of lands of Pardee's Beach Development Corporation; thence, leaving the lands of the said Kinsella, and with the lands of the said Corporation

(2) South 27° 45′ East 99 feet to a corner common to the lands of the said Erickson, and the lands of New-

ton R. Brown, Jr., et ux; thence, leaving the lands of the said Corporation and with the lands of the said Brown

(3) South 58° 36′ West 186 feet to a corner common to the lands of the said Erickson, lands of the said Brown, and to a point on the easterly side of the said unnamed street; thence, leaving the lands of the said Brown and the easterly side of the said unnamed street

(4) North 31° 15′ West 99 feet to the place of beginning, containing 0.39 acre, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone) 1927 N A Datum.

The above described land is substantially the same land as that described in a deed from Frank J. Young and Norma E. Young, his wife, to Herbert Erickson and Helen Mary Erickson, his wife, dated August 10, 1957 and filed for record August 12, 1957 in Deed Book 235, Page 686 in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS

Herbert Erickson and
Helen Mary Erickson, his wife
571 46th Street
Brooklyn, New York

Mary A. Treible, her heirs, devisees and assigns
Address unknown
Right of Way

East Stroudsburg Savings,
Building and Loan Association
East Stroudsburg, Pennsylvania
Mortgagee

ESTIMATED JUST COMPENSATION $12,000.00

TRACT 1500

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Smithfield and Township of Middle Smithfield and more particularly bounded and described as follows:

Beginning at a corner common to the lands of the Evangelical Lutheran Ministerium, and the lands of John S. Michael, and at a point in the line of lands of Pardee's Beach Development Corporation, said point being the beginning of the third, or South 24½° East 59 perches, line of lands described in a deed from E. Clarence Miller and Cornelia E. Miller, his wife, to the Evangelical Lutheran Ministerium, dated July 17, 1928 and filed for record in Deed Book 111, Page 507 in the records of Monroe County, Pennsylvania, said point being further located South 42° 30′ West 4420 feet, more or less, from the intersection of the centerline of Township Route Number 546 with the centerline of Township Route Number 515; thence, from said point of beginning and with the lands of the said Michael, the following courses and distances:

(1) North 59° 37′ East 141 feet

(2) North 37° 00′ East 1370 feet to a point in the line of lands of Herbert H. Theune; thence, leaving the lands of the said Michael, and with the lands of the said Theune

(3) South 28° 40′ East, passing the center of Pennsylvania Legislative Route Number 45012 at approximately 1390 feet, in all 2829 feet to a point on the right bank of the Delaware River; thence, leaving the lands of the said Theune, and with the right bank of the said river, downstream, the following courses and distances:

(4) South 66° 59′ West, passing the line between the Township of Smithfield and the Township of Middle Smithfield at approximately 350 feet, in all 1054 feet

(5) South 56° 48′ West 484 feet to a corner common to the lands of the said Ministerium and the lands of Patrick F. Rooney, et al; thence, leaving the right bank of the said river and with the lands of the said Rooney

(6) North 28° 33′ West, passing a corner common to the lands of the said Rooney and the lands of Ervin E. Rouch, et ux, and repassing the center of the said Legislative Route at approximately 997 feet, in all 1237 feet, to a corner common to the lands of the said Ministerium and the lands of the said Corporation; thence,

leaving the lands of the said Rouch, and with the lands of the said Corporation, the following courses and distances:

(7) North 52° 41′ East, repassing the line between the Township of Smithfield and the Township of Middle Smithfield at approximately 46 feet, in all 138 feet

(8) North 28° 30′ West 937 feet, to the place of beginning, containing 82.39 acres, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone) 1927 N A Datum.

The above described land is substantially the same land as that described in a deed from E. Clarence Miller and Cornelia E. Miller, his wife, to the Evangelical Lutheran Ministerium dated July 17, 1928 and filed for record August 7, 1930 in Deed Book 111, Page 507 in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS

Evangelical Luthern Ministerium
Also known as Evangelical Lutheran Ministerium of
Pennsylvania and Adjacent States
A Pennsylvania Corporation
c/o Peter M. Mattoon, Esq.,
1035 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania

Estimated Just Compensation $186,000.00

TRACT 1501

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield and more particularly bounded and described as follows:

Beginning at a corner common to the lands of Herbert H. Theune, and the lands of Lee B. Koehler, et ux, and

at a point in the line of lands of Deer Haven Corporation, said point being the beginning of the fifth or South 33° 25′ East 1505 feet, line of lands described on page 20 in a survey dated January 9, 1942 in a deed from Karl Theune and Elizabeth Theune, his wife, to Herbert H. Theune, dated July 29, 1953 and filed for record in Deed Book 195, Page 19, in the records of Monroe County, Pennsylvania, said point being further located North 69° 00′ West 2890 feet, more or less, from the intersection of the centerline of Township Route Number 546, with the centerline of Pennsylvania Legislative Route Number 45012; thence, from said point of beginning, and with the lands of the said Koehler

(1) South 45° 09′ East, passing a corner common to the lands of the said Koehler and the lands of Louis Warncke, et ux, and passing the center of Township Route Number 515 at approximately 718 feet, in all 1503 feet, to a corner common to the lands of the said Theune and the lands of the said Warncke; thence, continuing with the lands of the said Warncke

(2) North 50° 28′ East 891 feet to a corner common to the lands of the said Theune, lands of the said Warncke, and the lands of Edith M. Michael; thence, leaving the lands of the said Warncke, and with the lands of the said Edith M. Michael, as follows:

(3) North 40° 49′ East 29 feet

(4) South 45° 34′ East, passing the Northerly right of way line of the said Legislative Route at approximately 994.50 feet, in all 1011 feet to the center of the said Legislative Route and leaving the center of the said Legislative Route

(5) South 38° 03′ East, passing the Southerly right of way line of the said Legislative Route at approximately 16.50 feet, in all 117 feet

(6) South 53° 08′ West 35 feet

(7) South 34° 12′ East 913 feet to a point on the right bank of the Delaware River; thence, leaving the lands of the said Edith M. Michael, and with the right bank of the said river, downstream, the following courses and distances:

(8) South 48° 36′ West 327 feet
(9) South 39° 10′ West 404 feet
(10) South 37° 54′ West 583 feet
(11) South 45° 14′ West 538 feet
(12) South 51° 34′ West 532 feet
(13) South 59° 29′ West 311 feet to a corner common to to the lands of the said Thenue and the lands of the Evangelical Lutheran Ministerium; thence, leaving the right bank of the said river, and with the lands of the said Ministerium

(14) North 28° 40′ West, passing the center of the said Legislative Route at approximately 1,439 feet, passing a corner common to the lands of the said Ministerium, and the lands of John S. Michael, at approximately 2,829 feet, and passing the Southerly right of way line of the said Township Route Number 515 at approximately 3,132.50 feet, in all 3,149 feet, to a corner common to the lands of the said Thenue and the lands of the said John S. Michael, and to a point in the center of the said Township Route Number 515; thence, with the center of the said Township Route Number 515, and continuing with the lands of the said John S. Michael

(15) South 76° 53′ West 661 feet to a corner common to the lands of the said Theune, lands of the said John S. Michael, and the lands of the said Corporation; thence, leaving the center of the said Township Route Number 515, and leaving the lands of the said John S. Michael, and with the lands of the said Corporation, the following courses and distances:

(16) North 44° 44′ West, passing the Northerly right of way line of the said Township Route Number 515 at approximately 16.50 feet, in all 760 feet
(17) North 43° 26′ East 647 feet
(18) South 43° 34′ East 540 feet
(19) North 48° 03′ East 1005 feet to the place of beginning, containing 178.39 acres, more or less.

There is excepted from the above described land, the following tract:

Tract: 1515
Owner: Nicholas J. Behr, et ux
Acres: 1.02

The above described land after the aforesaid exception contains 177.37 acres, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone) 1927 N A Datum.

The above described land is substantially the same land as that described in a deed from Karl Theune and Elizabeth Theune, his wife, to Herbert H. Theune, dated July 29, 1953 and filed for record August 7, 1953, in Deed Book 195, Page 19, in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS

Herbert H. Theune and
Maria Theune, his wife
R.D. #1
East Stroudsburg, Pennsylvania

Karl Theune and
Elizabeth Thenue, his wife
Address unknown
Life Estate

Mrs. Samuel Strunk
Address unknown
Right of Way

Wilson Stettler
R.D. #2
Northampton,
Pennsylvania
Tenant

Equitable Life Assurance Society
of the United States
New York, New York
Mortgagee

ESTIMATED JUST COMPENSATION $175,000.00

TRACT 2122

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield and more particularly bounded and described as follows:

Beginning at a corner common to the lands of the Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States and the lands of the Monroe Security

Bank and Trust Company, Trustee, and in the line of the lands of Karl Hope, et ux, said point being located South 24° 50′ West 3635 feet, more or less, from the intersection of the center of Legislative Route Number 45012 with the center of Township Route Number 633; thence, from the said point of beginning and with the lands of the said Bank and Trust Company, the following courses and distances:

(1) South 46° 46′ East 1664 feet (3rd Course, Deed Book 151, Page 133, North 43° West, 100 perches) to a point in the center of the said Legislative Route; thence, continuing with the lands of the said Bank and Trust Company and with the center of the said Legislative Route,

(2) South 33° 01′ West 376 feet to a point in the center of the said Legislative Route; thence, leaving the center of the said Legislative Route and continuing with the lands of the said Bank and Trust Company,

(3) South 57° 36′ East 1079 feet to a point in the right descending bank of the Delaware River; thence, leaving the lands of the said Bank and Trust Company, and with the said right descending bank of the Delaware River, the following courses and distances:

(4) South 02° 58′ East 394 feet,
(5) South 19° 34′ West 418 feet,
(6) South 31° 21′ West 556 feet,
(7) South 40° 05′ West 386 feet,
(8) South 26° 32′ West 358 feet to a corner common to the lands of Edward J. McFeely, et ux, and the lands of the said Ministerium; thence, leaving the right descending bank of the said river, and with the lands of the said McFeely, et ux,

(9) North 54° 20′ West 394 feet to a point in the center of the said legislative route; thence, continuing with the lands of the said McFeely, et ux, and with the center of the said legislative route,

(10) South 13° 25′ West 250 feet to a corner common to the lands of the said Ministerium and the lands of Mary Kessler Barr; thence, leaving, the lands of the said McFeely, et ux, and leaving the center of the said Legislative Route, and with the lands of the said Barr,

(11) North 53° 57′ East 530 feet; thence, continuing with the lands of the said Barr, the following courses and distances:

(12) South 41° 32′ West 258 feet,
(13) North 52° 05′ West 1055 feet to a point in the line of the lands of John A. Farrington; thence, leaving the lands of the said Barr and with the lands of the said Farrington, the following courses and distances:

(14) North 49° 46′ East 455 feet,
(15) North 47° 13′ West, crossing the center of Township Route Number 515 at approximately 21 feet, passing a corner common to the lands of the said Farrington and lands of Western Heritage Properties Limited (Inc.) at 105 feet, in all 854 feet,
(16) South 74° 45′ West 262 feet to a corner common to the lands of Francis Hickok Erdman, et al, and the lands of the said Western Heritage; thence, leaving the lands of the said Western Heritage and with the lands of the said Erdman, et al, the following courses and distances:

(17) North 46° 31′ West 845 feet,
(18) North 46° 25′ East, passing a corner common to the lands of the said Erdman, et al, and the lands of George K. Brands, Sr., et ux, at 498 feet, passing a corner common to the lands of said Brands, Sr., et ux, and lands of Karl Hope, et ux, at 1592 feet, in all 2563 feet, to the place of beginning, containing 183.79 acres, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone), 1927 N. A. Datum.

It being the intent of the foregoing description to include a part of the same land as that described in a deed from Mary Turn Balir, et al, to Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States, dated September 12, 1945 and filed for record September 26, 1945 in Deed Book 151, Page 133, in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS

Evangelical Lutheran Ministerium
Also known as Evangelical Lutheran Ministerium
of Pennsylvania and Adjacent States
c/o Peter M. Mattoon, Esq.,
1035 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania

Estimated Just Compensation $210,000.00

TRACT 2132

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield, and more particularly bounded and described as follows:

Beginning at a corner common to the lands of the Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States and the lands of John Stettler, et ux, and at a point in the line of the lands of Sterling R. Schoonover, said point being further located North 80° 26′ East 3410 feet, more or less, from the intersection of the center of Legislative Route Number 45012 with the center of Township Route Number 633; thence, from the said point of beginning and with the lands of the said Stettler, et ux,

(1) South 51° 42′ East, passing a corner common to the lands of the said Stettler, et ux, and the lands of Harold Jensen, et ux, at 420 feet, the said point being in the center of Township Route Number 515, in all 965 feet, to a point on the right descending bank of the Delaware River; thence, leaving the lands of the said Jensen, et ux, and with the said right descending bank, the following courses and distances:

(2) South 61° 46′ West 69 feet,
(3) South 35° 02′ West 1396 feet to a corner common to the lands of the said Ministerium and the lands of Albert A. Owens, et ux; thence, leaving the right descending bank and with the lands of the said Owens, et ux,

(4) North 49° 50′ West 892 feet to a point in the center of the said Township Route Number 515; thence, continuing with the lands of the said Owens, et ux, and with the center of the said Township Route Number 515,

(5) South 62° 13′ West 140 feet to a point in the center of the said Township Route Number 515; thence, leaving the center of the said Township Route Number 515, and continuing with the lands of the said Owens, et ux, the following courses and distances:

(6) North 61° 01′ West 478 feet,
(7) North 48° 42′ East 141 feet,
(8) North 56° 54′ East 198 feet,
(9) South 60° 37′ East 247 feet,
(10) North 40° 20′ East 895 feet to a corner common to the lands of the said Owens, et ux, and the lands of the said Schoonover; thence, leaving the lands of the said Owens, et ux, and with the lands of the said Schoonover,

(11) North 44° 15′ East 377 feet (6th Course, Deed Book 125, Page 475, North 57° 49′ East 364.5 feet) to the place of beginning, containing 37.72 acres, more or less.

It being the intent of the foregoing description to include the same land as that described in:

(1) A deed from J. W. R. Hilliard and Anne H. Hilliard, his wife, to Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States, dated November 18, 1936 and filed for record November 30, 1936, in Deed Book 125, Page 475.

(2) A deed from J. W. R. Hilliard and Anne H. Hilliard to Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States, dated January 18, 1937 and filed for record February 20, 1937, in Deed Book 126, Page 184.

(3) A deed from J. W. R. Hilliard and Anne H. Hilliard to Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States, dated November 10, 1944

and filed for record February 14, 1945 in Deed Book 148, Page 414.

All of the above deeds are found in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS

Evangelical Lutheran Ministerium
Also known as Evangelical
Lutheran Ministerium of
Pennsylvania and Adjacent States
A Pennsylvania Corporation
c/o Peter M. Mattoon, Esq.,
1035 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania

J. W. R. Hilliard
and Ann H. Hilliard,
his wife
Address unknown
Option Rights

Estimated Just Compensation $144,000.00

TRACT NOS. 2940 AND 2941

TRACT NO. 2940

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield, and more particularly bounded and described as follows:

Being all of lots numbers two (2), three (3), four (4), five (5), six (6), seven (7), eight (8) and nine (9), in Section Number Two (2), Map of Proposed Sub-division, Winona Lakes, Middle Smithfield Township, Monroe County, Pennsylvania, dated December, 1964, and filed for record March 15, 1965 in Plot Book 9, Page 121, in the records of Monroe County, Pennsylvania.

The above described tract contains 5.63 acres, more or less.

It is the intent of the foregoing description to include the same land as that described in a deed from Karl Hope and Hilda Hope, his wife, to Florence McMenamin, dated December 5, 1968 and filed for record December 5, 1968, in Deed Book 368, Page 596, in the record of Monroe County, Pennsylvania.

TRACT NO. 2941

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield, and more particularly bounded and described as follows:

Being all of lots numbers eighty-five (85), eighty-six (86), eighty-seven (87), eighty-eight (88), eighty-nine (89) and ninety (90) in Section Number Two (2), Map of Proposed Sub-division, Winona Lakes, Middle Smithfield Township, Monroe County, Pennsylvania, dated December, 1964, and filed for record March 15, 1965 in Plot Book 9, Page 121, in the records of Monroe County, Pennsylvania.

The above described tract contains 2.40 acres, more or less.

It is the intent of the foregoing description to include the same land as that described in a deed from Karl Hope and Hilda Hope, his wife, to Florence McMenamin, dated December 5, 1968 and filed for record December 5, 1968, in Deed Book 368, Page 601, in the records of Monroe County, Pennsylvania.

NAME AND ADDRESS OF PURPORTED OWNER OF TRACT NOS. 2940 AND 2941

Florence McMenamin
c/o Harold E. Kohn
2600 The Fidelity Building
Philadelphia, Pennsylvania

ESTIMATED JUST COMPENSATION FOR TRACT NO. 2940 $5,000.00

ESTIMATED JUST COMPENSATION FOR TRACT NO. 2941 $2,000.00

TRACT NO. 2942

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield, and more particularly bounded and described as follows:

Being all of lot number ninety-four (94) in Section Number Two (2), Map of Proposed Sub-division, Winona Lakes, Middle Smithfield Township, Monroe County, Pennsylvania, dated December, 1964, and filed for record March 15, 1965 in Plot Book 9, Page 121, in the records of Monroe County, Pennsylvania.

The above described tract contains 0.36 acre, more or less.

It is the intent of the foregoing description to include the same land as that described in a deed from Karl Hope and Hilda Hope, his wife, to Norman Lohman dated February 14, 1969, and filed for record February 17, 1969, in Deed Book 370, Page 660, in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS:

Norman Lohman and
Agnes L. Lohman, his wife
85 North First Street
Stroudsburg, Pennsylvania

ESTIMATED JUST COMPENSATION $1,750.00

TRACT NO. 2943

A certain tract of land situated in the State of Pennsylvania, County of Monroe, Township of Middle Smithfield, and more particularly bounded and described as follows:

Being all of lot number ninety-five (95) in Section Number Two (2), Map of Proposed Sub-division, Winona Lakes, Middle Smithfield Township, Monroe County, Pennsylvania, dated December, 1964, and filed

for record March 15, 1965 in Plot Book 9, Page 121, in the records of Monroe County, Pennsylvania.

The above described tract contains 0.38 acre, more or less.

It is the intent of the foregoing description to include the same land as that described in a deed from Karl Hope and Hilda Hope, his wife, to Robert J. Berish dated February 14, 1969, and filed for record February 17, 1969, in Deed Book 370, Page 656, in the records of Monroe County, Pennsylvania.

NAMES AND ADDRESSES OF PURPORTED OWNERS:

Robert J. Berish and
Carolyn H. Berish, his wife
2 North Seventh Street
Stroudsburg, Pennsylvania

ESTIMATED JUST COMPENSATION $1,750.00

TRACT NO. 8547

A certain tract of land situated in the State of Pennsylvania, County of Pike, Township of Lehman, and more particularly bounded and described as follows:

Beginning at a corner common to the lands of the subject owner, the lands now or formerly of Louise P. Browning, et al, and at a point in the lands now or formerly of Irving S. Courtright, et ux, the said point being located in the center of Township Route Number 318, the said point being further located South 30° 58′ East 660 feet, more or less, from the intersection of the center of the said Township Route Number 318 with the center of Township Route Number 314; thence, from the said point of beginning and with the lands of the said Browning, et al, the following courses and distances:

(1) South 27° 46′ West 153 feet

(2) North 58° 20′ West, passing a corner common to the lands of the said Browning, et al, and the lands now or formerly of Frederick Alfred Kellermann, et ux, and continuing with the center of the said Township Route Number 314, at 1022 feet, in all 1302 feet, to a corner common to the lands of the said subject owner and the lands of the said Browning, et al, and at a point in the center of the said Township Route Number 314; thence, leaving the lands of the said Kellermann, et ux, and leaving the center of the said Township Route Number 314 and with the lands of the said Browning, et al, the following courses and distances:

(3) North 56° 16′ East 583 feet

(4) North 40° 29′ East 346 feet to a corner common to the lands of the said subject owner and the lands now or formerly of the Honeymoon Resorts, Inc., and at a point in the center of the said Township Route Number 318; thence, leaving the lands of the said Browning, et al, and with the lands of the said Resorts, Inc., and with the center of the said Township Route Number 318, the following courses and distances:

(5) South 38° 03′ East 260 feet

(6) South 04° 14′ East 32 feet to a point in the center of the said Township Route Number 318; thence, leaving the center of the said Township Route Number 318 and continuing with the lands of the said Resorts, Inc.,

(7) North 74° 10′ East 807 feet, (1st Course, Deed Book 84 Page 553, North 86° 00′ East 50 rods),

(8) South 61° 34′ East 535 feet

(9) North 55° 20′ East 127 feet

(10) North 19° 46′ East 88 feet

(11) South 60° 29′ East 193 feet

(12) North 21° 51′ East 591 feet to a point in the line of the lands of the said Browning, et al; thence, leaving the lands of the said Resorts, Inc., and with the lands of the said Browning, et al, the following courses and distances:

(13) South 36° 54′ East 846 feet

(14) South 48° 28′ West 1415 feet to a corner common to the lands of the said subject owner, the lands of the said Courtright, et ux; thence, leaving the lands of the said Browning, et al, and with the lands of the said Courtright, et ux, the following courses and distances:

(15) North 63° 04′ West 870 feet

(16) South 41° 52′ West 256 feet to a point in the center of the said Township Route Number 318; thence, continuing with the lands of the said Courtright, et ux, and with the center of the said Township Route Number 318,

(17) South 31° 13′ East 69 feet to the place of beginning, containing 56.80 acres, more or less.

The bearings used herein are referenced to the Pennsylvania State Rectangular Grid System (North Zone), 1927 N.A. Datum.

It is the intent of the foregoing description to include the same land as that described in:

(1) A deed from Mary C. McCaffrey, widow, to Richard Thoma and Elsie Thoma, his wife, dated March 26, 1931 and filed for record March 27, 1931 in Deed Book 84, Page 553.

(2) A deed from W. L. DeVore and Rose M. DeVore, his wife, to Richard Thoma and Elsie Thoma, his wife, dated August 8, 1939 and filed for record October 19, 1940 in Deed Book 95, Page 520.

Both of the above deeds are found in the records of Pike County, Pennsylvania.

The said Richard Thoma died during December, 1943.

NAME AND ADDRESS OF PURPORTED OWNERS

Elsie Thoma, widow
413 53rd Street
West New York, New Jersey

ESTIMATED JUST COMPENSATION $62,000.00

The gross sum estimated to be just compensation for the land hereby taken is $893,000.00

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

[Filed Jan. 31, 1973]

UNITED STATES OF AMERICA, PLAINTIFF

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., DEFENDANTS

AFFIDAVIT OF REV. DR. WILLIAM A. JANSON

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF PHILADELPHIA) SS

I, William A. Janson, being duly sworn according to law, depose and say as follows:

1. I am the president of the Southeastern Pennsylvania Synod of the Lutheran Church in America ("the Synod"), a Pennsylvania nonprofit corporation which is the owner of land involved in the above captioned condemnation proceedings. This affidavit is based either upon personal knowledge or information and belief.

2. A portion of the condemned property known as Camp Miller, and designated as Tract 1500 on the Corps of Engineers Project Map, is composed of approximately 82 acres of land which were purchased by the Synod in 1927. The construction of improvements essential to its use as a camp was begun immediately thereafter, and on the date of the condemnation there were approximately 55 structures in use on this Tract. These included, among others, 22 cabins, kitchen and dining facilities, staff quarters, an infirmary and administration facilities.

These structures were erected and utilized for the sole purpose of operating a summer camp for approximately 1450 boys each year. A staff of 68 persons operated the camp.

3. Another portion of the condemned property, known as Camp Hagan, and designated as Tract 2132 on the Corps of Engineers Project Map, is composed of approximately 40 acres of land which were purchased in 1937. The thirty-four structures being used on the condemnation date were erected over a period of years beginning in 1937 and ending in 1959. The types of structures at Camp Hagan are similar to those found at Camp Miller and they were used exclusively for the purpose of operating a summer camp for approximately 1400 young girls yearly. A staff of 68 persons operated this camp.

4. The third portion of the condemned property, known as Camp Ministerium, and designated as Tract 2122 on the Corps of Engineers Project Map, consists of approximately 184 acres of land which were purchased in 1945. This camp was constructed in the 10 year period from 1947 to 1959 and consisted of approximately 37 structures on the date of condemnation. These structures, which are similar to those provided at the other two camps, were used exclusively for family camping and accommodated approximately 600 persons a year. A staff of 32 persons operated the camp.

5. In order to provide a substitute for the camp facilities condemned by the Government, the Synod has acquired a large tract of land, at a cost of $321,000, in Bear Creek Township, Luzerne County. The Synod has already expended an amount in excess of $110,000 for engineering and architectural fees incurred in planning the proposed construction of substitute facilities. The new facilities will be functionally equivalent to those condemned by the Government, and these facilities will meet the state regulatory requirements promulgated since the erection of the condemned facilities.

6. The City of Philadelphia operates a residential camp facility on a 671 acre tract of land in Monroe and Pike Counties, Pennsylvania. This camp, Camp William Penn, is located in the same area, and has facilities similar to those provided by the Synod's camps. Camp William Penn has 75 structures and serves approximately 1450 Philadelphia children yearly.

7. The City of Philadelphia also operates Camp Larchwood, a residential camp located in Berks County on 120 acres of land leased by the City. Camp Larchwood serves approximately 400 Philadelphia children yearly.

8. The federal government as part of the Model Cities program, P.L. 89-754; 80 Stat. 1255, totally finances the operation of Camp Larchwood and also provides approximately $200,000 per annum to cover the cost of indigent Philadelphia children attending private camps.

/s/ William A. Janson
WILLIAM A. JANSON

SWORN and SUBSCRIBED before me this 22nd day of January, 1973.

/s/ [Illegible]
Notary Public
Philadelphia, Philadelphia Co.

My Commission Expires March 13, 1976

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 70-240 Civil

Tract No. 1500
Tract No. 2122
Tract No. 2132

[Filed Jan. 15, 1974]

UNITED STATES OF AMERICA, PLAINTIFF

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., DEFENDANTS

APPEARANCES:

For Plaintiff:	S. John Cottone United States Attorney Post Office Building Scranton, Pa. Peter H. Ruvolo Attorney William J. Kollins Attorney Department of Justice Washington, D.C.
For Defendant Southeastern Pennsylvania Synod of the Lutheran Church in America	John V. Bonneau, Esq. Peter M. Mattoon, Esq. H. Ober Hess, Esq. Ballard, Spahr, Andrews & Ingersoll 1035 Land Title Building Philadelphia, Pa. Joseph C. Kreder, Esq. Warren, Hill, Henkelman & McMenamin Scranton Electric Building Scranton, Pa.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 70-240 Civil

Tract No. 1500
Tract No. 2122
Tract No. 2132

UNITED STATES OF AMERICA, PLAINTIFF

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., DEFENDANTS

MEMORANDUM

Plaintiff, United States of America, has requested the court to make certain pre-trial rulings in the above captioned matter.

On June 15, 1970, the government condemned three recreational camps titled in the name of the Southeastern Pennsylvania Synod of the Lutheran Church in America. The camps were used by children during the summer months of each year. Following the condemnation two of the three camps were leased back to the defendant by the government for an annual rental. The camp program is conducted in the name of the Eastern Pennsylvania Lutheran Camp Corporation, a Pennsylvania nonprofit corporation, the board of directors of which is appointed by the president of the Southeastern Pennsylvania Synod of the Lutheran Church in America and the Northeastern Pennsylvania Synod of the Lutheran Church in America on a joint basis.

The camps are open to children without any restriction as to race, creed or color, nor is there any policy of giving priority in registration to any religious denomination. Registrations are accepted on a first come first serve basis. The camps also serve children with mental, psychological, financial and other special needs.

The main issue before the court at this time is what standard is to be applied in determining "just compensation" for the property condemned. Defendant argues that the substitution of facilities doctrine is to be applied in this situation where a non-profit corporation supplies a public service. The government contends that only when a public governmental body is the condemnee is substitution a proper standard.

Defendant's land apparently has a special character. The land and improvements were specifically designed for camping purposes. The camps provide a service not only to those of the Lutheran faith but to children of all faiths and diverse backgrounds. However, the ownership of the camps is in a private organization.

Only in those cases in which the condemnee was a governmental public entity has the substitution doctrine been applied. Brown v. U.S., 1923, 263 U.S. 78; U.S. v. Certain Lands, 3 Cir. 1957, 246 F. 2d 823; U.S. v. Certain Property in Borough of Manhattan, 2 Cir. 1968, 403 F. 2d 800; U.S. v. Certain Property in Borough of Brooklyn, 2 Cir. 1965, 346 F. 2d 690; U.S. v. New York, 2 Cir. 1948, 168 F. 2d 387; U.S. v. Board of Education of Mineral County, 4 Cir. 1958, 253 F. 2d 760; Town of Clarksville, Va. v. U.S., 4 Cir. 1952, 198 F. 2d 238, *cert. denied*, 1953, 344 U.S. 927; Mayor and City of Baltimore v. U.S., 4 Cir. 1945, 147 F. 2d 786; City of Fort Worth v. U.S., 5 Cir. 1951, 188 F. 2d 217; Jefferson County v. Tennessee Valley Authority, 6 Cir. 1945, 146 F. 2d 564, *cert. denied*, 1945, 324 U.S. 871; U.S. v. Arkansas, 8 Cir. 1947, 164 F. 2d 943; U.S. v. Des Moines County, 8 Cir. 1945, 148 F. 2d 448, *cert. denied*, 1945, 326 U.S. 743; State of Washington v. U.S., 9 Cir. 1954, 214 F. 2d 33, *cert. denied*, 1954, 348 U.S. 862; California v. U.S., 9 Cir. 1948, 169 F. 2d 914; U.S. v. Los Angeles County, 9 Cir. 1947, 163 F. 2d 124; Woodville v. U.S., 10 Cir. 1946, 152 F. 2d 735, *cert. denied*, 1946, 328 U.S. 842; U.S. v. Certain Land in City of Red Bluff, N.D. Cal. 1961, 192 F. Supp. 725; U.S. v. 43.635 Acres of Land, D.C. Mo. 1960, 183 F. Supp. 168; U.S. v. 1.433 Acres of Land, D. Kans. 1947, 71 F. Supp. 854; U.S. v. 0.886 of an Acre of Land, E.D. N.Y. 1946, 65 F. Supp. 827. *See also* Just Compensation And The Public Condemnee, 1966, 75 Yale L.J. 1053; Level, Evaluation Of Special Purpose Properties In Condemnation Proceedings, 1971, 3 Urban Lawyer 428; 40 A.L.R. 3d 143.

The substitution standard is allowed a public condemnee because of the unique nature of the ownership, i.e., community property, and the necessity, legal or otherwise, to replace the facility. U.S. v. Certain Property in Borough of Manhattan, supra. A governmental unit has the responsibility to serve the public, and holds property in trust for the public welfare. When public property is lost through condemnation, the measure of compensation is the cost of providing the community with a necessary replacement. U.S. v. Certain Lands, 3 Cir. 1957, supra; U.S. v. Certain Property in Borough of Manhattan, supra. Unlike the private condemnee situation, the governmental condemnee, when there is no necessity to replace the facility, is entitled to little or no compensation since there is no loss suffered. U.S. v. Certain Lands, supra.

The governmental condemnee does not hold property for its own advantage, but solely for the public need. U.S. v. Certain Lands, supra. The loss is peculiar to the community and compensation is measured not in "value" but by the loss to the community. U.S. v. Certain Property in Borough of Manhattan, supra.

The defendant is not a governmental public condemnee, but a private religious organization. The property is not held and used exclusively for the public without any advantage to the defendant.[1] The camp program is conducted in the name of the Eastern Pennsylvania Lutheran Camp Corporation. The defendant is under no public obligation to replace the camp facilities. The fact defendant considers it a practical necessity to rebuild the camp is not unlike any other private condemnee who must out of a practical necessity rebuild a home, business place, or eleemosynary facility. The defendant can be made whole by using a valuation standard of compensation.

> ". . . Confronted with the occasional inadequacy of the 'market value' test and the general impracticability of any other, the courts have adopted a pragmatic solution. In certain instances, notably in the case of property held for eleemosynary or other nonprofit purposes, such as schools, churches and clubs (but not private dwellings), and public utilities, where property with a high value for the use to which it is being put would have a much lower market value because of the paucity or absence of buyers for that use, the courts consider value to the owner, sometimes finding it necessary to apologize for what is wrongly conceived to be a lapse from true doctrine by the rather obviously untrue statement that the property has 'no' market value, 1 Orgel, supra, § 38; in such cases evidence of reproduction cost less depreciation is admitted, whether as showing value to the owner or as indicating what might be paid by a buyer if one existed." United States v. Certain Property Located in the Borough of Manhattan, 2 Cir. 1962, 306 F. 2d 439, 447.

The defendant can at any time cease to use the land as a camping facility, and can use it for any purpose it deems proper. A governmental body does not have such discretion without violating the public trust.

It is not a denial of equal protection to allow a substitution of facilities when a governmental condemnee is involved but not in the case of a private condemnee. When property is condemned, the condemnee must be indemnified for the loss. The market value standard of using comparable sales is most frequently employed to determine just compensation. When comparable sales are not available, such as in special character property as we have here, other methods of valuation are utilized, e.g., the capitalization of earnings or the reproduction cost minus depreciation standard. No one method of valuation is exclusive. U.S. v. Virginia Electric Co., 1961, 365 U.S. 624, 633; U.S. v. Certain Property Located in the Borough of Manhattan, 2 Cir. 1962, supra. The Supreme Court has approved the substitution standard as a proper method of valuation. Brown v. U.S., supra at 82-83.

A refusal to allow the defendant the cost of a substitute facility because its property is privately owned does not involve an invidious distinction, but a distinction on which is both proper and necessary. The loss by a governmental condemnee is a loss to the public generally, and the obligation or duty of a replacement is the responsibility of the public entity and ultimately the public. The private condemnee lacks the responsibility to replace the facility. The public through its governmental body is the recipient of compensation for the loss, while the private condemnee alone receives compensation for the loss. Finally, the private condemnee may terminate the substitute facility for the use intended at

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[1] Although the religious distribution of the campers results from a first come first serve application policy, the following distribution of Lutheran and non-Lutheran campers from two camps, Miller and Hagan, is relevant:

	Lutheran	Non-Lutheran
1965	59%	41%
1966	60%	49% [sic]
1967	62%	38%
1968	64%	34% [sic]
1969	61%	39%
1970	43%	57%
1971	41%	59%
1972	45%	55%

Affidavit of Rev. Roy E. Gulliford at 7.

any time, but the public condemnee cannot because of its public duty to continue the service.[2]

Upon presentation of proper evidence, defendant may utilize other standards of valuation, other than the comparable sales approach, to prove just compensation. Hickey v. United States, 3 Cir. 1953, 208 F. 2d 269, cert. denied 1954, 347 U.S. 919; U.S. v. 84.4 Acres of Land, W.D. Pa. 1963, 224 F. Supp. 1017, *rev'd*, 348 F. 2d 117; U.S. v. Certain Property Located in the Borough of Manhattan, 2 Cir. 1962, supra; U.S. v. Benning Housing Corporation, 5 Cir. 1960, 276 F. 2d 248; Fairfield Gardens, Inc. v. United States, 9 Cir. 1962, 306 F. 2d 167; U.S. v. 206.82 Acres of Land, M.D. Pa. 1962, 205 F. Supp. 91; 4 Nichols, The Law of Eminent Domain §§ 12.313, 12.32.

In Newton Girl Scout Council v. Massachusetts Turnpike Authority, Mass. 1956, 138 N.E. 2d 769, 773-775, involving the condemnation of a camping facility, the court speaks of similar valuation problems present here:

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[2] "Here the evidence is without dispute that the school district must of necessity replace the buildings that the State destroyed by the taking. The school district is obligated and must have the additional classrooms in order to provide the facilities needed by the school, and consequently there is no way to do it and at the same time utilize the valuable improvements remaining on the 18.35 acres except by replacement.

"There is a fundamental distinction between obligation resting on the agency condemning public property, and that of condemning private property. This distinction lies in the obligation thereby imposed on the condemnee. For example, a private party owes no duty to the public to continue its operation either at its original location or elsewhere. It can move, it can stay, or it can liquidate as it alone sees fit. Not so with a school system charged with a legal obligation to the public. A school system suffering the loss of one of its schools by condemnation must replace that school when the facility is necessary to the education of its children as shown by the undisputed evidence in this case. This is the legally imposed duty on the school district, and it has no other choice." State v. Waco Independent School District, Tex. 1963, 364 S.W. 2d 263, 268. *See also* City of Wichita v. Unified School District No. 259, Kan. 1968, 439 P. 2d 162, 168; Jefferson County v. Tennessee Valley Authority, 6 Cir. 1945, 146 F. 2d 564, 565, *cert. denied*, 1945, 324 U.S. 871; Level, Evaluation of Special Purpose Properties In Condemnation Proceedings, supra at 431-432 and 439; *cf.* Joslin Co. v. Providence, 1923, 262 U.S. 668, 675.

"The general rule is that the measure of damages is the fair market value of the property actually taken at the time of the taking. . . . In determining fair market value, the effort is to determine " 'the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market." ' Epstein v. Boston Housing Authority, 317 Mass. 297, 299-300, 58 N.E. 2d 135, 137. All the uses to which the property is reasonably adapted may be considered. . . . Although its 'value for any special purpose is not the test * * * it may be considered, with a view of ascertaining what the property is worth in the market for any use for which it would bring the most.' Conness v. Commonwealth, 184 Mass. 541, 542-543, 69 N.E. 341. See Smith v. Commonwealth, 210 Mass. 259, 261, 96 N.E. 666; Olson v. United States, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L.Ed. 1236.

"Under the authorities already cited, the Girl Scouts, in their attempt to show loss of market value, were plainly entitled to present evidence bearing on every use to which the property was adapted, including (but not limited to) the specialized use for which the property was being employed effectively at the time of the taking. It was open to the Girl Scouts (a) to prove the value of the property for use by a charitable or religious organization or for a school group, and the extent to which the taking had injured or prevented that use; (b) to show the extent of the market, if any, for properties adapted for such use; (c) to establish the general basis on which such properties change hands when they do change hands, the various elements of value which are given weight by organizations naturally interested in the acquisition of such properties, and the methods by which such properties are usually acquired; and (d) to present evidence of other similar relevant factors.

"It is not to be expected that the properties adapted for such a specialized use will have a very active market or that their market value can be shown by sales of nearby comparable property. Once developed, such properties are rarely abandoned or sold. To assist the trier of the fact of value to reach a just result when such a property is taken by eminent domain, it frequently will be necessary to allow much greater flexibility in the presentation of evidence than would be necessary in the case of properties having more conventional uses. In such cases, for example detailed knowledge by expert witnesses of local prices of land for ordinary residential or commercial use may be far less helpful than knowledge of conditions (relevant to this particular type of property) over a wide geographical area and of the demand for and use of comparable specialized properties by a particular industry or class of users or customers. The property may be of a character where, within fairly wide limits, geographical location has less effect on its value than its adaptability for a particular use. The properties may be of a type, not frequently bought or sold, but usually acquired by their owners and developed from the ground up, so that the cost of land plus the reproduction cost (less depreciation where appropriate) of improvements may be more relevant than in the ordinary case.

"The practical problems inherent in the valuation of such properties have been recognized in the Massachusetts decisions, as well as in the authorities generally. Special opportunities for proof of value have long been afforded in cases where it is felt that there is no market value, in the sense in which, in most communities, market value is at all times reflected by a steady volume of sales or ordinary commercial and residential properties. The occasion for this difference in type of proof (permitting the use of valuation data other than those factors ordinarily bearing on market price) has been expressed in terms of absence of market value, see comprehensive discussion in Tigar v. Mystic River Bridge Authority, 329 Mass. 514, 517, 109 N.E.2d 148, or of market. See, for example, United States v. Miller,

317 U.S. 369, 374, 63 S.Ct. 276, 87 L.Ed. 336. The courts in these cases, however, may be doing no more than recognizing that more complex and resourceful methods of ascertaining value must be used where the property is unusual or specialized in character and where ordinary methods will produce a miscarriage of justice. In such cases, it is proper to determine market value from the intrinsic value of the property and from its value for the special purposes for which it is adapted and used. See Nichols, Eminent Domain (3d ed.) s. 12.32, especially at pages 134-136, and ss. 18.41[3], 18.42; Jahr, Eminent Domain, ss. 71, 78, 82 (specialty uses), 83, 84 (properties of non-profit organizations); Orgel, Valuation under Eminent Domain (2d ed.) ss. 30, 37-40, especially at pages 177-179, 181-183; Manify, Damages in Eminent Domain, 34 B.U.L.Rev. 146, 151-152; McCormick, Measure of Compensation in Eminent Domain, 17 Minn.L.Rev. 461, especially at pages 467-470.

"These unusual problems of proof of damages most frequently arise in cases of service-type properties like churches, convents, hospitals, country clubs, school and college premises and buildings of religious and charitable societies and similar organizations. . . .

"It is, of course, true that, where there is no market value, in the sense of a steady current of sales of similarly used properties in the vicinity, the burden is on the owner to show that it is impossible to prove the value of the property without using some mode of ascertaining value which does not depend on market value in this sense of the term. . . . In the present case, however, the Girl Scouts had amply shown that camps of this type were not commonly bought and sold."

See also Eminent Domain: The Problem of Damages Where Land Has Been Adapted to a Special Use, 1957, 37 B.U.L.Rev. 495.

Plaintiff's principal request for pre-trial rulings is whether the substitution standard is proper in this case. Both parties are in disagreement on other points because of their difference on the propriety of the substitution standard. The standard of valuation to be applied will depend largely on the proof presented.[3] Until then, the court will reserve ruling on the valuation standard or standards to be applied.

An appropriate order will issue.

/s/ [Illegible]
Chief Judge
Middle District of Pennsylvania

Dated: January 15, 1974.

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[3] "There is no *one way* of valuing special purpose properties; each case will require special consideration. The rules respecting proof must afford some leeway if the owner is to receive constitutional indemnification." Level, Evaluation of Special Purpose Properties in Condemnation Proceedings, supra at 439.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 70-240 Civil

Tract No. 1500
Tract No. 2122
Tract No. 2132

[Filed Jan. 15, 1974]

UNITED STATES OF AMERICA, PLAINTIFF

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., DEFENDANTS

ORDER

In accordance with memorandum this date filed,

It is ORDERED that

1. The cost of substitute facilities is not a proper measure of compensation for the taking of defendant's property;

2. All other rulings relative to the valuation standard or standards to be applied are reserved.

/s/ [Illegible]
Chief Judge
Middle District of Pennsylvania

Dated: January 15, 1974.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

[Filed Apr. 24, 1974]

UNITED STATES OF AMERICA, PLAINTIFF

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., DEFENDANTS

AFFIDAVIT OF JOHN J. LEVKULIC

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF PHILADELPHIA) SS
)

John J. Levkulic, being duly sworn according to law, deposes and says as follows:

1.

Professional Background—I graduated from Pennsylvania State University in 1954 with the degree of Bachelor of Science in Civil Engineering. From June, 1954 to December, 1955 I was employed as an engineer at the U.S. Navy Shipyard in Philadelphia. From 1955 to 1957 I served in an engineering capacity with a United States Navy SeaBees Construction Battalion in Antigua, Puerto Rico and Cuba. In 1957 I took employment with Amporico Corporation in an engineering capacity connected with major construction projects in Puerto Rico and continued in that professional role until 1962. Since 1962 I have been with Robert F. Miller Associates, an engineering and architectural firm with offices in Pottsville and Tamaqua. I have been president of the firm since 1969. Our firm has on its staff six registered engineers, one registered architect and three engineers with engineering degrees but who are not yet registered. I am a registered engineer in Pennsylvania and Puerto Rico and am a member of the Executive Board of the Pennsylvania Society of Professional Engineers.

In my professional capacity I have designed state parks, state highways, state buildings and public school buildings and have supervised the letting of many construction contracts. I have worked up and certified cost estimates on all public projects on which I have worked as an engineer and on most private projects as well. I have been involved in many state projects supported by Federal grants which grants were based on my cost estimates.

2.

Connection With Southeastern Pennsylvania Synod Camps Project—I, and other members of our firm working under my supervision, have been in charge of the engineering design and costing of camp facilities required by the Southeastern Pennsylvania Synod to take the place of Camps Miller, Hagan and Ministerium in the Tocks Island area of Monroe County. Our work has progressed to the working drawing stage and our compensation to date has been in excess of $128,000. Our design calls for relocating the camps at a site acquired by the Synod in Bear Creek for the length of at least one mile. Our work has given particular attention to providing substitute facilities for those existing at Camps Miller, Hagan and Ministerium on the Delaware River as of June 15, 1970. In that connection I have given attention to the costs involved in replacing such facilities and particularly to the additional costs resulting:

(a) From Government and other construction requirements applicable to new camps from which pre-existing camps were exempt,

(b) From the need to provide access to the new site,

(c) From the need to provide roadway and waterline interconnections within the site, and

(d) From the need to create a dam on Bear Creek to provide water facilities for aquatic programs at the new site.

All cost figures given in this affidavit represent my professional estimate as of December 1, 1972.

3.

Sewage Facilities—The three old camps provided for sewage disposal by the use of septic tanks. The Sewage Facilities Act, as administered by the Department of Environmental Resources, will not permit a new facility of the size required to replace Camps Miller, Hagan and Ministerium to use septic tanks. A complete sewage treatment plant and connecting sewer lines is an absolute requirement. The system and lines will cost $434,400 as compared with a cost of $22,000 for three septic tank systems with connecting lines. In addition, the sewer treatment plant will require maintenance expenses as listed below, none of which is required by the septic tank systems at the old camps:

Licensed operator at $150 per week for 16 weeks per year	$2,400.00
Electricity at $100 per month for four months per year	400.00
Chemicals at $150 per season	150.00
Miscellaneous repairs and maintenance expense at $500 per year	500.00
Total per year	$3,450.00

It thus appears that in order to create lawful functioning camp facilities an additional net capital cost of $412,400 is required for sewer facilities alone, plus an annual operating cost of $3,450 for the indefinite future. A tabulation of the items entering into the cost of the sewage treatment plant and connecting lines is attached as Exhibit A.

4.

Department of Environmental Resources Requirements and Requirements of American Standard National Plumbing Code, as Enforced by Luzerne County, as Affecting Buildings—Attached hereto as Exhibit B is a tabulation showing the list of buildings and outdoor facilities at Camp Ministerium as they existed on June 15, 1970. On this exhibit the numbers prefixed by A represent structures and those prefixed by X represent outdoor facilities, such as tennis courts, base ball and volley ball fields. Also attached, as Exhibit C, is a tabulation showing the list of buildings and outdoor facilities on Camp Miller at that date. The prefixes B and Y refer, respectively, to structures and outdoor facilities. Attached as Exhibit D is a tabulation showing the list of buildings and outdoor facilities at Camp Hagan on that date. The prefixes C and Z refer, respectively, to structures and outdoor facilities. Each of these exhibits shows the estimated cost of replacing such buildings and facilities as they were on that date, except that in some instances exact replacement of the item was no longer allowed by the regulations referred to. The extra cost involved in compliance is as follows:

A-1	Dining and recreation hall	$ 2,710.00
A-11	Staff house	2,100.00
B-1	Dining Hall	4,895.00
B-2	Recreation hall	2,430.00
B-9a	Wash house	3,640.00
B-9b	Wash house	2,580.00
B-15	Wash house	1,060.00
B-16	Wash house	2,800.00
C-1	Dining hall	4,635.00
C-2	Recreation hall	1,215.00
		$28,065.00

5.

American Camping Association Requirements Affecting Buildings—Certain requirements enforced by this Association through its accreditation procedure, particularly with respect to cabin floor space and plumbing fixtures, will add substantially to the cost of substituted facilities. The items of added cost of these requirements, again referring to the items tabulated on Exhibits B, C and D, are as follows:

A-7a	Campers cabins	
A-7b	Campers cabins	
A-7c	Campers cabins	
A-7d	Campers cabins	$ 50,500.00
A-11	Staff house	2,720.00
A-13	Staff house	2,720.00
B-6a	Campers cabin	
B-6b	Campers cabin	22,700.00
B-7a	Campers cabin	
B-7b	Campers cabin	
B-7c	Campers cabin	14,700.00
C-5a	Campers cabin	
C-5b	Campers cabin	
C-5c	Campers cabin	
C-5d	Campers cabin	62,920.00
		$156,260.00

6.

Substitution of Water Facilities—The old camps had frontage on the West side of the Delaware River totaling 5,115 feet, and from this access they had the use of the river for as much as 20 miles in each direction. Construction of a dam on Bear Creek on the new site will provide a small lake, a much inferior substitute, but it is all that can be reasonably managed. The proposed dam will provide 3,000 feet of frontage, inasmuch as the new camps will be located on both sides of the lake formed by it. This body of water will provide a 1400 straight linear foot pool for canoes, boats and other aquatic activities. The cost of the dam will be as follows:

Construction	$940,600.00
Erosion control to meet Department of Environmental Resources requirements	25,000.00
Soils engineering to satisfy similar requirements	35,000.00
	$1,000,600.00

A tabulation of the items involved in the cost of the construction of the dam, as above set forth, is attached as Exhibit E.

7.

Waterfront Facilities—To replace the waterfront facilities as they existed at the old camps on June 15, 1970 would involve the following costs:

Miller	$44,500
Hagan	17,900
Ministerium	4,800
	$67,200

A substitute facility at the new site could be provided at the lower cost of $47,100. A tabulation of this item is attached as Exhibit F.

8.

Roadways—The three old camps all had frontage on public highways which made it unnecessary to have access roads and which also served as a means of moving readily from camp to camp. In fact these highways passed directly through each camp and provided for ease of movement within each. The following highway distances existed within each camp:

Miller	— 1600 ft. on L.R. 45012
Ministerium	— 2800 ft. on L.R. 45012
Hagan	— 1600 ft. on T—515
	6000 feet

At the Bear Creek site the location is 1.7 miles from Pennsylvania Route 115, the nearest public highway. The cost of an access road from Route 115 to the boundary of the site of the proposed camps, constructed to comply with sedimentation and erosion control requirements of the Department of Environmental Resources, is $253,988.

Roads will be required within the camp site to get from one camp to another, in excess of the interior roadways of the three old camps. At the old camp, by reason of public highways passing through them, approximately 1800 feet of paved roadway was adequate. Within the new site approximately 13,200 of paved roadway will be required. The cost of the new interior roadways will be $578,677, whereas the direct replacement cost of 1800 feet of paved roadway at the old site would be only $40,000.

9.

Bridge—In view of the reduced availability of water at the new site it is necessary to use both sides of the lake created by the proposed dam. To do so requires construction of a bridge meeting the requirements of the Department of Environmental Resources. Such a bridge will cost $76,000. Final plans for the bridge have been approved by the Department of Environmental Resources. A tabulation is attached as Exhibit G showing in detail the cost of both the bridge and the required roadway. Not included in the tabulation is a further item of $10,000 of cost which will be incurred in order to insure compliance with sedimentation and erosion control requirements.

10.

Power Lines—The three old camps had access directly on their internal boundary to public power lines. At the new site the lines will have to be brought a distance of 1.7 miles from the power lines on Route 115 at a cost of $47,000.

11.

Water System—To create a functional substitute for the water systems at the old camps would cost $478,905 whereas a direct replacement cost of the old systems would be $302,000. The differential is accounted for by two factors, one being the longer lines required in the new camps and the other being the matter of pipe size. As a matter of engineering practice it would be intolerable to replace exactly the old sizes. A tabulation of the detail of the water system substitute is attached as Exhibit H.

/s/ John J. Levkulic
JOHN J. LEVKULIC

SWORN TO and SUBSCRIBED before me this 9th day of August, 1973.

/s/ Shirley Fox
SHIRLEY FOX
Notary Public
Philadelphia, Philadelphia County
My Commission Expires:
February 13, 1975

EXHIBIT A

LUTHERAN CAMP
BEAR CREEK

SEWAGE SYSTEM

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
22,200 L.F.	8″ Vitrified Clay Pipe	8.00	$177,600.00
9,300 L.F.	6″ Vitrified Clay Pipe	7.50	69,750.00
72 Ea.	Manholes (Various Depths)	700.00	50,400.00
14 Ea.	Cleanouts	120.00	1,680.00
1	Sewage Treatment Plant Building & Equipment		125,000.00
1	Sedimentation and Erosion Control		10,000.00
		TOTAL	$434,430.00

EXHIBIT B

Proposed tabulations of bid items for Outdoor and Building Facilities Type A and X originally located at Camp Ministerium.

Facility No.	Qty.	Description	Unit Cost	Total Cost
A1	1	Dining & Recreation Hall	$147,188.00	$147,188.00
A2	—	(See Bldg. Facility B-18)	—	—
A3	1	Caretakers Residence at Maintenance	68,865.00	68,865.00
A4	1	Storage Shed at Maintenance (Combined with A5 & A15)	14,389.00	14,389.00
A5	—	(See Bldg. Facility A4)	—	—
A6	1	Camp Directors Residence at Hagan	68,556.00	68,556.00
A7	16	Campers Cabins	16,160.00	258,560.00
A8	1	Shower House	42,729.00	42,729.00
A9	—	Well and Pump House	Contract 2	—
A10	2	Garage at Maintenance	21,472.00	42,944.00
A11	1	Staff Cabin	44,046.00	44,046.00
A12	2	Classroom Building	39,887.00	79,774.00
A13	1	Staff Cabin	44,046.00	44,046.00
A14	1	Classroom Building	39,782.00	39,782.00
A15	—	(See Building Facility A4)	—	—
A16	7	Tent Platforms	1,419.00	9,933.00
X1	1	Baseball with Backstops and Home Plate	6,000.00	6,000.00
X2	1	Basketball	2,800.00	2,800.00
X3	1	Badminton	530.00	530.00
X4	1	Badminton	530.00	530.00
X5	1	Badminton at HAGAN	530.00	530.00
X6	1	Badminton at HAGAN	530.00	530.00
X7	—	Beach Front (Contracts 1 & 2)	—	—
X8	1	Flagpole	1,130.00	1,130.00

Total Cost Building and Outdoor Facilities, Types A and X for Camp Ministerium.

SUBTOTAL = $872,862.00

EXHIBIT C

Proposed tabulations of bid items for Outdoor and Building Facilities Type B and Y originally located at Camp Miller.

Facility No.	Qty.	Description	Unit Cost	Total Cost
B1	1	Dining Hall	$181,398.00	$181,398.00
B2	1	Recreation Hall	95,337.00	95,337.00
B3 C4	1	Infirmary	69,418.00	69,418.00
B4	1	Camp Director Residence	68,556.00	68,556.00
B5 a	1	Storage Shed at Maintenance	14,681.00	29,070.00
b	1		14,389.00	
B6	8	Campers Cabins	15,050.00	120,400.00
B7	14	Campers Cabins	18,494.00	258,916.00
B8	1	Shower House	44,337.00	44,337.00
B9	2	Wash House	14,900.00	29,800.00
B10	1	Office at Ministerium	24,968.00	24,968.00
B11	1	Visitors Latrine at Administration	12,595.00	12,595.00
B12 C10	1	Canteen with Main Office at Administration	41,998.00	41,998.00
B13	1	Arts and Crafts	40,279.00	40,279.00
B14	1	Staff Cabin	25,588.00	25,588.00
B15	1	Wash House	15,606.00	15,606.00
B16	1	Staff Cabin	25,588.00	25,588.00
B17	3	Barn at Maintenance	21,521.00	64,563.00
B18	1	Storage Shed at Maintenance (Combined with A2 and C13)	14,389.00	14,389.00
B19	3	Tent Platforms	1,419.00	4,257.00
B20	7	Tent Platforms	1,419.00	9,933.00
Y1	1	Tennis at Ministerium	3,500.00	3,500.00
Y2	1	Volleyball at Ministerium	800.00	800.00

Exhibit C—Continued

Facility No.	Qty.	Description	Unit Cost	Total Cost
Y3	1	Basketball	2,800.00	2,800.00
Y4	1	Badminton	530.00	530.00
Y5	4	Archery Range	650.00	2,600.00
Y6	1	Basketball	2,800.00	2,800.00
Y7	1	Outdoor Chapel	6,100.00	6,100.00
Y8	1	Baseball with Backstop and Home Plate	6,000.00	6,000.00
Y9	1	Volleyball	800.00	800.00
Y10	1	Tennis)	3,100.00	
Y11	1	Tennis)	3,100.00	6,200.00
Y12	1	Badminton	530.00	530.00
Y13	2	Shuffleboard	1,250.00	2,500.00
Y14	1	Basketball	2,800.00	2,800.00
Y15	1	Badminton	530.00	530.00
Y16	1	Baseball (No Backstop) with Home Plate	5,500.00	5,500.00
Y17	1	Volleyball	800.00	800.00
Y18	1	Amphitheater	8,500.00	8,500.00
Y19	—	Beachfront (Contracts #1 and #2)	—	—
Y20	1	Flagpole	1,130.00	1,130.00

Total Cost Building and Outdoor Facilities, Type B and Y for Camp Miller

TOTAL $1,231,416.00

EXHIBIT D

Proposed tabulations of bid items for Outdoor and Building Facilities Type C and Z originally located at Camp Hagan.

Facility No.	Qty.	Description	Unit Cost	Total Cost
C1	1	Dining Hall	$163,773.00	$163,773.00
C2	1	Recreation Hall	84,322.00	84,322.00
C3	1	Arts and Crafts	40,279.00	40,279.00
C4	—	(See Building Facility B3/C4)	—	—
C5	18	Camper Cabins	24,722.00	444,996.00
C6	2	Wash Houses	14,905.00	29,810.00
C7	1	Staff Cabin	25,588.00	25,588.00
C8	1	Staff Cabin	25,588.00	25,588.00
C9	1	Staff Cabin	25,588.00	25,588.00
C10	—	(See Building Facility	—	—
C11	1	Administrative Directors Residence	66,842.00	66,842.00
C12	6	Tent Platforms	1,419.00	1,419.00
C13	—	(See Building Facilities B18)	—	—
STP	1	Control Building, Sewage Treatment Plant	Contract 2	
Z1	1	Outdoor Chapel	6,100.00	6,100.00
Z2	3	Archery Range	650.00	1,950.00
Z3	1	Basketball	2,800.00	2,800.00
Z4	1	Shuffleboard	1,250.00	1,250.00
Z5	1	Tennis Court)	3,100.00	
Z6	1	Tennis Court)	3,100.00	6,200.00
Z7	1	Basketball	2,800.00	2,800.00
Z8	1	Volleyball	800.00	800.00
Z9	1	Volleyball	800.00	800.00
Z10	1	Baseball with Backstop and Homeplate	6,000.00	6,000.00

Exhibit D—Continued

Facility No.	Qty.	Description	Unit Cost	Total Cost
Z11	1	Baseball (No backstop) with Homeplate	5,500.00	5,500.00
Z12	1	Field Hockey/Soccer	19,500.00	19,500.00
Z13	—	Beach Front (Contracts #1 and #2)	—	—
Z14	1	Flagpole	1,130.00	1,130.00
Z15	1	Speedball	5,200.00	5,200.00
Z16	1	Kickball	1,300.00	1,300.00
Z17	1	Running Track	4,000.00	4,000.00
S1-29	L.S.	Signs	L.S.	3,700.00

Total Cost Building and Outdoor Facilities Types C and Z for Camp Hagan.

TOTAL = $984,330.00

EXHIBIT E

ITEMIZED COST ESTIMATE

DEER LAKE DAM, LUTHERAN CAMP CONTRACT NO. 1

ITEM	QUANTITY	UNIT	UNIT PRICE	AMOUNT
1. EXCAVATION, UNCLASSIFIED	86,500	C.Y.	$ 2.00	$173,000.00
2. COMPACTED DAM EMBANKMENT	34,000	C.Y.	1.00	34,000.00
3. SPECIAL COMPACTION OF FILL	3,000	C.Y.	2.00	6,000.00
4. SAND, GRAVEL & COBBLE FILL	500	C.Y.	8.00	4,000.00
5. PLAIN CEMENT CONCRETE	1,500	C.Y.	110.00	165,000.00
6. REINFORCED CEMENT CONCRETE	2,160	C.Y.	150.00	324,000.00
7. OUTLET WORKS	ONE	L.S.	71,000.00	82,400.00
8. CRUSHED STONE	1,630	C.Y.	10.00	16,300.00
9. DUMPED RIP-RAP, 24" LAYER	2,450	C.Y.	8.45	20,700.00
10. HAND-PLACED RIP-RAP, 12" LAYER	5,800	C.Y.	19.25	111,650.00
11. VIT. CLAY PIPE, 6" I.D.	370	L.F.	8.25	3,050.00
12. FENCE (TY. 2 ROW)	200	L.F.	2.50	500.00
TOTAL				$940,600.00

EXHIBIT F

LUTHERAN CAMP
BEAR CREEK

CONTRACT NO. 2

December 1, 1972

***BEACH CONSTRUCTION* OF 3 BEACHES**

Beach Area $\frac{500' \times 110'}{9} = 6{,}100$ S.Y.

Protected by 540 L.F. of Concrete Curb

	QUANTITY	DESCRIPTION	UNIT PRICE		TOTAL
49	6,100 S.Y.	Subgrade	$ 0.40		$ 2,440.00
50	6,100 S.Y.	4″ Soil Bit. Base Course	2.00		12,200.00
51	6,100 S.Y.	6″ Natural White Beach Sand	3.00		18,300.00
52	540 L.F.	10″ x 24″ Plain Conc. Curb	8.00		4,320.00
	L.F.	Landscaping, Erosion Control	2,000.00		2,000.00
	3 Ea.	Wharf 40′ x 5′ x 3″ x 12″ @.85 B.F. 3 – 40′ 4″ x 12 8 Piles (2D′)	 820.00) 350.00) 350.00)	=	3,510.00

3 Ea.	Floating Diving Board	350.00 350.00	2,100.00
3 Ea.	Life Guard High Chair	350.00	1,050.00
	Incidentals		1,000.00
	TOTAL FOR 3 BEACHES		46,920.00
	EACH BEACH		15,640.00
	Each Beach Use		15,700.00
	3 BEACH TOTAL		$47,100.00

Exhibit G

LUTHERAN CAMP
BEAR CREEK

CONTRACT NO. 2

December 1, 1972

ROADWAY

	QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
1	45 Ac.	Clear & Grub	$600.00	$ 27,000.00
2	115,000 C.Y.	Excavation	1.80	207,000.00
3	49,000 C.Y.	Borrow Excavation	1.50	73,500.00
4	54,000 S.Y.	2½″ ID—2A	1.80	97,200.00
5	17,500 S.Y.	6″ Bitu. Conc. Base Course	3.80	66,500.00
6	39,000 S.Y.	4″ Bitu. Conc. Base Course	2.70	105,300.00
7	57,000 S.Y.	4″ 2A Mod. Stone Agg.	0.85	48,450.00
8	57,000 S.Y.	Subgrade	0.30	17,100.00
9	29,500 S.Y.	6″ Select Material Surface	1.25	36,875.00
10	20,000 L.F.	8′ Shoulder	0.80	16,000.00
11	15,000 L.F.	6′ Shoulder	0.70	10,500.00
12	9,200 L.F.	3′ Shoulder	0.50	4,600.00
13	46,000 L.F.	2.5′ Shoulder	0.45	20,700.00
14	3,500 L.F.	Guard Rail	3.00	10,500.00
15	125 L.F.	72″ Reinforced Cement Conc. Pipe	80.00	10,000.00
16	510 L.F.	48″ Reinforced Cement Conc. Pipe	35.00	17,850.00
17	280 L.F.	36″ Reinforced Cement Conc. Pipe	27.00	7,560.00
18	140 L.F.	30″ Reinforced Cement Conc. Pipe	25.00	3,500.00
19	230 L.F.	24″ Reinforced Cement Conc. Pipe	19.00	4,370.00
20	1,500 L.F.	18″ Reinforced Cement Conc. Pipe	14.00	21,000.00
21	14 Ea.	R.C.C. Headwalls	250.00	3,500.00
22	7,000 L.F.	Drainage Swales & Ditches	1.50	10,500.00
23	20 Ea.	Pipe End Sections	70.00	1,400.00
24	22 Ton	Calcium Chloride	80.00	1,760.00
25	1 Ea.	Bridge	L.S.	76,000.00
		TOTAL OF ABOVE		$898,665.00

EXHIBIT H

LUTHERAN CAMP
BEAR CAMP

WATER SYSTEM

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
1,000 L.F.	6″ Cast Iron Pipe	$ 10.00	$ 10,000.00
3,550 L.F.	6″ Cast Iron Pipe	10.00	35,500.00
11,400 L.F.	4″ Cast Iron Pipe	6.70	76,380.00
5,800 L.F.	4″ Cast Iron Pipe	6.70	38,860.00
300 L.F.	3″ Cast Iron Pipe	5.30	1,590.00
1,200 L.F.	2″ Cast Iron Pipe	4.00	4,800.00
8,000 L.F.	1″ Copper Pipe	4.00	32,000.00
5 Ea.	Drinking Fountains	640.00	3,200.00
9 Ea.	6″ to 8″ Gate Valve & Valve Box	300.00	2,700.00
9 Ea.	3″ to 4″ Gate Valve & Valve Box	140.00	1,260.00
24 Ea.	1″ to 2″ Gate Valve & Valve Box	60.00	1,440.00
3 Ea.	Pumphouse	4,725.00	14,175.00
3 Ea.	Well & Pumphouse Equipment	14,000.00	42,000.00
1 Ea.	30,000 Gal. Storage Tank Complete	65,000.00	65,000.00
2 Ea.	50,000 Gal. Storage Tank Complete	75,000.00	150,000.00
	TOTAL		$478,905.00

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

[Filed Apr. 24, 1974]

UNITED STATES OF AMERICA, PLAINTIFF

v.

564.54 ACRES OF LAND, MORE OR LESS SITUATE IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., DEFENDANTS

AFFIDAVIT OF REV. ROY E. GULLIFORD

COMMONWEALTH OF PENNSYLVANIA)
) SS
COUNTY OF PHILADELPHIA)

The Reverend Roy E. Gulliford, being duly sworn according to law, deposes and says as follows:

1.

Identity of Affiant—Since March 1, 1970, I have been Executive Director of Camps Miller, Hagan and Ministerium which until June 15, 1970, were owned by the Southeastern Pennsylvania Synod of the Lutheran Church in America, and operated on its behalf. In my capacity as Executive Director, I have had complete responsibility for, and oversight of, the operation of these camps, including their programs and policies, as well as all budgetary, accounting and financial matters.

2.

Site Location—These three camps were, and Camps Hagan and Ministerium still are, located directly upon the Delaware River in Monroe County, Pennsylvania at

Shawnee on the Delaware. For many decades the aquatic activities have been the core of their program. The river front was well equipped with landings and beaches for swimming and canoeing. Our equipment inventory includes 25 canoes which are constantly and extensively used for trips for which the location is unusually suitable, the Delaware being safely and easily navigable by canoe for at least 20 miles in each direction. It includes in addition 12 playaks and six rowboats actively used in the aquatic programs. The interior of the camps fronts on a paved public highway which makes the sites readily accessible with a minimum of driveway and public utility line construction inside the camp limits.

3.

Condemnation and Lease Back—These three camps were condemned by the United States on June 15, 1970. The structures on Camp Miller were extensively vandalized and promptly razed, rendering it of no further use as a camp after the 1970 season. Following the condemnation Camps Hagan and Ministerium were leased back to us by the United States of America at a rental of $15,600 per year, and the camp program has continued at Camps Hagan and Ministerium without interruption to the present date.

4.

Church Affiliation and Financial Support—Prior to condemnation the camps were titled in the name of the Southeastern Pennsylvania Synod of the Lutheran Church in America. The camp program, however, is conducted in the name of the Eastern Pennsylvania Lutheran Camp Corporation, a Pennsylvania nonprofit corporation, the board of directors of which is appointed by the president of the Southeastern Pennsylvania Synod of the Lutheran Church in America and the Northeastern Pennsylvania Synod of the Lutheran Church in America on a joint basis. This corporation is the agency of both synods for the purpose of conducting the camping program and is financially supported by both. Direct synod financial support by appropriations for operating expenses in recent years has been:

1965	$13,746
1966	15,030
1967	16,026
1968	14,627
1970	14,450
1971	23,003
1972	28,228
1973	28,228

5.

Camp Eligibility—For more than 40 years both Camps Miller and Hagan have served boys and girls from age 8 to age 16. There has never been any restriction on the basis of race, creed or color, nor is there any policy of giving priority in registration to any religious denomination. Registrations are accepted strictly on a first come first served basis. Camp Ministerium has for more than ten years been operated as a small group camp for boys and girls from age 9 to 17 with no restrictions as to race, creed or color, and no policy of giving priority to the members of any religious denomination. All applicants are accepted on a first come first served basis and, in fact, diversity is essential to meaningful small group camping.

6.

Special Need Campers—Determined effort has always been made to serve children with special needs, whether mental, psychological or financial. Among these children are the mentally retarded at White Haven State School, White Haven, Pennsylvania, the psychologically disturbed children at Silver Springs School, Plymouth Meeting, Pennsylvania, the poor boys sent to camp by the Tri-Square Masonic group, and the poor children who come to camp under our own Campership Program.

In the case of White Haven, we have had in the 1973 season seven severely retarded children for whom the School pays our regular rates, notwithstanding their care must be very individual and therefore very expensive to us.

In the case of Silver Springs, we have had 20 disturbed children in the 1973 season. Again the School pays standard rates notwithstanding the special care required.

In the case of the Tri-Square Masonic program we have had the following utilization paid for at standard rates by that organization:

1969	43 boys
1970	38 boys
1971	65 boys
1972	55 boys
1973	42 boys

In our own Campership Program, we have had the following numbers in recent years, which represent about 10% of our total enrollment volume:

1970	92 underprivileged campers for 149 weeks
1971	106 underprivileged campers for 161 weeks
1972	115 underprivileged campers for 208 weeks
1973	161 underprivileged campers for 239 weeks

These children are largely sent to us by child care agencies in eastern Pennsylvania, principally in Wilkes Barre, Scranton, Allentown, Bethlehem, Easton and Philadelphia. The cost of these children is met by a special fund raising effort which I conduct among individuals, service clubs, Lutheran congregations and wherever I can interest people in helping children in this way. Additional funds are raised by the special efforts of the president of the Southeastern Pennsylvania Synod of the Lutheran Church in America.

7.

Racial and Religious Distribution—We do not keep records showing separately white and non-white enrollments. My observation, however, is that during my tenure from 10 to 15% of our campers are non-white, and that about 5% of our counsellor staff is non-white. Religious distribution figures have been maintained for Camps Miller and Hagan since 1965 and they show the following:

	Lutheran	Non-Lutheran
1965	59%	41%
1966	60%	49%
1967	62%	38%
1968	64%	34%
1969	61%	39%
1970	43%	57%
1971	41%	59%
1972	45%	55%

As stated above, no racial or religious group is favored in the matter of admissions. The foregoing distribution results from the application of a first come first serve policy except that the special need groups to which I have referred are assured priority.

8.

Fees Paid by Campers—The schedule of weekly fees prevailing over the last ten years is as follows:

	Lutheran	Non-Lutheran
1963	$30	$32
1964	30	32
1965	32	34
1966	32	34
1967	36	38
1968	36	38
1969	45	47
1970	45	47
1971	45	55
1972	49	59
1973	49	59

It should be noted that when we receive contributions from their sponsors, all Campership children are admitted at the lower rate regardless of church affiliation. The foregoing fees fall far short of meeting the expenses of operation. The following figures are illustrative and in connection with them it is to be noted that the expense figures shown do not include anything for depreciation or general administrative overhead:

1969—Fees and contributions in lieu of fees received	$191,782.87
Operating expense	205,738.93
1970—Fees and contributions in lieu of fees received	151,942.84
Operating expense	175,521.21
1971—Fees and contributions in lieu of fees received	121,031.00
Operating expense	179,582.00
1972—Fees and contributions in lieu of fees received	122,611.00
Operating expense	177,545.00

9.

Comparison with Camp William Penn—This camp is owned by the City of Philadelphia and is located in Monroe and Pike Counties, Pennsylvania, about nine miles north of Marshalls Creek. It is managed under the direction of Henry Windish, Administrative Assistant to the Recreation Commissioner of the City of Philadelphia. It is comparable to the combined Camps Hagan and Ministerium as presently operated. Some points of comparison applicable in the current year are as follows:

Length of season:	
William Penn	8½ weeks
Hagan and Ministerium	9 weeks
Average campers per week:	
William Penn	320
Hagan and Ministerium	335
Operating budget per season:	
William Penn	$129,000
Hagan and Ministerium	177,500

In connection with the foregoing cost and budget figures, it should be noted that Camp William Penn has some operating expenses taken care of outside of its budget. For example, all its laundry is done in Philadelphia prisons at no cost. All of its motor vehicles are supplied and maintained by the City at no cost. Mr. Windish's salary is paid by the Philadelphia Department of Recreation as is his office overhead. There are some differences also in its program. William Penn has no canoes and no aquatic activities other than swimming on the lake on which it is located. Its counsellors also are on a different qualification and compensation scale. At Hagan and Ministerium all counsellors (except for five high school seniors) are high school graduates at least and are paid a minimum of $375 per season, whereas at William Penn, 41 of 90 counsellors have not finished high school and those who have not finished high school are paid $200 per season.

10.

Government Assistance—Our camps are eligible for participation in the U.S. Department of Agriculture Special Milk Program which reimburses us at the rate of two cents per half pint of milk served persons at our camp under 21 years of age. This subsidy amounts to approximately $1,200 per year. A copy of an illustrative voucher form is attached as Exhibit A.

We are also eligible for U.S. Department of Agriculture surplus food and through this program receive such provisions as peanut butter, rice, flour, oatmeal and the like. What we receive depends upon the quantities of the various surplus items available. They vary widely. The monetary value of commodities received in recent years is:

1971	$2,249.00
1972	1,935.00
1973	2,189.50

Eligibility for this program requires full compliance with Title VI of the Civil Rights Act of 1964 which, according to the agreement entered into between our camps and the Commonwealth of Pennsylvania as administrator for the U.S. Department of Agriculture, requires that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity of recipient agency to which assistance is provided by the United States Department of Agriculture. Admission policies are understood and agreed by recipient agency to be a part of such programs and activities." Our camps have never violated these conditions nor have they ever been challenged with having done so. A copy of the agreement and related materials is attached as Exhibit B.

The real estate on which the camps operated has always been exempt from township, county and school district real estate taxes because the camps are "institutions of purely public charity."

11.

Public Demand—There is a growing call for the services which our camps render. For most of our regular sessions there are waiting lists which cannot be taken care of. Demand from specialized groups is also mounting. The White Haven State School desires that we operate a day camp for 30 to 40 retarded children. The Luzerne County Child Development Council requests us to accept 75 to 100 emotionally and physically handicapped children in a day camp program.

/s/ Roy E. Gulliford
Roy E. Gulliford

SWORN TO and SUBSCRIBED before me this 9th day of August, 1973.

/s/ Shirley Fox
Shirley Fox
Notary Public
Philadelphia, Philadelphia County
My Commission Expires:
February 13, 1975

FORM APPROVED OMB NO. 40-R3848

FORM FNS-807
(4-73)

U.S. DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE

REIMBURSEMENT VOUCHER

SPECIAL MILK PROGRAM

(SPECIAL SUMMER PROGRAM)

PLACE "X" IN BOX IF THIS IS AN ADJUSTED VOUCHER AND PREVIOUSLY SUBMITTED VOUCHER HAS BEEN PAID FOR REPORTING MONTH. ☐

Check for accuracy and make any changes that are necessary.

1. AGREEMENT NO. 42 C11 54661000

2. NAME & ADDRESS OF SCHOOL FOOD AUTHORITY OR SPONSOR
EASTERN PA CAMP CORP
BOX 3005
READING PA 19604

3. NAME AND ADDRESS OF SCHOOL, INSTITUTION OR CAMP

4. PERIOD COVERED BY THIS REPORT MONTH ☐☐ YEAR ☐☐ (21 22 23)

5. TOTAL NO. OF OPERATING DAYS THIS MONTH ☐☐ (24 25)

6. AVERAGE DAILY ATTENDANCE ☐☐☐☐☐☐ (26 27 28 29 30 31)

7. Number of ½ pints purchased .... ☐☐☐☐☐☐☐ (32 33 34 35 36 37 38)

8. Number of ½ pints served to:
(a) Adults .... ☐☐☐☐ (39 40 41 42)
(b) Children *(Item 7 minus 8(a))* .... ☐☐☐☐☐☐☐ (43 44 45 46 47 48 49)

9. Unit cost of ½ pint of milk *(Paid to supplier after discount)*
(a) Flavored .... ☐☐▨☐ *Whole cents* (50 51) *tenths* (52)
(b) Unflavored.... ☐☐▨☐ *Whole cents* (53 54) *tenths* (55)

10. Unit charge to child per ½ pint
(a) Flavored .... ☐☐▨☐ (56 57 58)
(b) Unflavored.... ☐☐▨☐ (59 60 61)

FOR FNS USE ONLY
Adjusted voucher code .... ☐☐ (77 78) 0 1 (79 80)

11. I CERTIFY that to the best of my knowledge and belief, this voucher is true and correct in all respects, that records are available to support this voucher; that it is in accordance with the terms of existing Agreement(s); and that payment therefor has not been received.

DATE OF PREPARATION
TITLE
SIGNATURE OF SPONSOR

ALL RECEIPTS, INVOICES, AND OTHER EVIDENCE OF PURCHASE MUST BE RETAINED AND AVAILABLE FOR FUTURE AUDIT FOR A PERIOD OF 3 YEARS AND 3 MONTHS AFTER THE END OF THE FISCAL YEAR TO WHICH THEY PERTAIN.

USE FOR SPECIAL SUMMER PROGRAM ONLY

INSTRUCTIONS

SPECIAL NOTE: AN ADJUSTED VOUCHER completely voids all previous vouchers for the same month. Therefore you should include ALL of your reporting data for the entire month's operation.

Submit original and one copy to Finance and Program Accounting Division, Food and Nutrition Service, USDA, Washington, DC 20250 not later than the 10th of the month following the month covered by the voucher. A copy must also be kept by the sponsor. Record all entries to the right in each group of boxes.

Report data for one calendar month only. Amount of reimbursement will be computed by USDA, based on rates in effect. YOUR CLAIM WILL BE RETURNED FOR CORRECTION if not properly completed. BE SURE TO SIGN THIS VOUCHER BEFORE MAILING TO AVOID DELAYING YOUR REIMBURSEMENT CHECK.

ITEM

3 Type or print as shown in Schedule A of the agreement.

4 Enter the number of the month and year this voucher covers.

Example: May 1973 = 0 5 7 3
Nov. 1973 = 1 1 7 3

5 Enter actual number of days milk was served.

6 Schools: Enter actual average attendance (not enrollment) for each school day. The school administrator's office determines this from attendance records.

9 Enter the actual price per half-pint of milk paid to milk distributor after discount. Show price in terms of cents not dollars (example: 5 4/10 cents. Report as 0 5 ▨ 4) Do not include any charge for equipment purchases or rentals.

10 Enter the charge to children per half-pint of milk. Show charge in terms of cents not dollars (example: 2 cents – reports as 0 2 ▨ 0) If milk is sold on other than a daily basis, enter average charge per half-pint.

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PROPERTY & SUPPLIES
BUREAU OF GOVERNMENT DONATED FOOD
2221 Forster St., P.O. Box 3361
Harrisburg, Penna. (17125)
Tele: (717) 787-2940

March 1, 1973

SUBJECT: Availability of Donated Commodities for Summer Camps for children - 1973 Camping Season

TO: All Sub-D.A.'s Serving Summer Camps
All Summer Camp Recipients
All Field Personnel

This is to advise that it is expected the following foods will be available for distribution to eligible non-profit summer camps for children during the 1973 camping season. The rates of distribution are on the basis of one eligible child camper per month for three meal a day camps and will be adjusted for camping periods of less than one month and for those camps that serve less than three meals daily.

Butter	1#		
Cornmeal	1#	Rice	1#
A.P. Flour	2#	Veg. Short.	1#
		Non-Fat Dry Milk	1#
		Rolled Oats	1#
Dry Beans	1#	*Peanut Butter	3/4#
		*Canned Meat	1½#

*Restricted Rate

NOTE: This listing may be augmented with additional food varieties or some of the varieties of commodities may be deleted . . .

Summer camp sponsoring agencies are reminded that only non-profit summer camps for children of high school age or below are eligible to participate in the receipt of donated commodities. Additionally, summer camp sponsoring agencies are required to comply, in every detail, with the provisions of Title VI of the Civil Rights Act of 1964, concerning non-discrimination in Federally-assisted programs of the United States Department of Agriculture.

Summer camps receiving commodities must provide for adequate storage and proper utilization of all donated foods received. Records of receipts, utilization and current inventory of all donated foods must be maintained at the campsite and at least one knowledgeable person must be available at all times to aid representatives of this Bureau and personnel of the United States Department of Agriculture in completing required inspection reviews of the camp's feeding program.

All donated foods in inventory at the close of the camping season must be returned to the issuing sub-distribution facility immediately upon the close of the camp for the season. Also, the camp is required to provide this Bureau with an end-of-camp season close-out inventory report of residual supplies of Donated Commodities.

Summer camps which desire to receive commodities may employ food service companies to conduct their feeding operation, providing that such services are contracted for only on a fee-for-service basis and contracts are approved, before receiving commodities, by the New York Regional Office, Food and Nutrition Service, United States Department of Agriculture and this Bureau.

If additional supplies of unrestricted commodities are needed, please contact this Bureau, advising the quantity of each commodity desired and the name and agreement number of the camp. Every effort will be made to supply you with the quantities of those foods that you indicate you can properly store and use without waste.

Please complete, in their entirety, all three copies of the enclosed agreement forms for the receipt of donated foods during the 1973 camping season. All three copies of each of these forms must be returned to this Bureau no later than April 19, 1973. The attached copies of the summer camp Questionnaire must also be completed in triplicate and all three returned with the completed agreement forms.

Best wishes for a most successful summer camp activity in 1973.

EXHIBIT B

Warren M. Vann, Jr.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PROPERTY AND SUPPLIES
BUREAU OF GOVERNMENT DONATED FOOD
PSDOF-111 REV. 8-71

AGREEMENT NO. 3 5-5

AGREEMENT BETWEEN THE COMMONWEALTH OF PENNSYLVANIA AND THE RECIPIENT AGENCY FOR COMMODITIES DONATED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

The below-named Recipient Agency hereby makes application for commodities donated by the United States Department of Agriculture to the Commonwealth of Pennsylvania.

The Recipient Agency is: (Check Type of Agency)

☒ A tax supported public, or a tax-exempt private, agency (other than a public or private school) operating a non-profit child feeding program such as a child care center, summer camp, or playground (underline type) and is serving 375 children daily.
(Average number)

☐ A non-penal tax supported public, or a non-penal tax-exempt (non-profit) private charitable institution with ______________ persons residing therein (not including staff or paid personnel).

The Recipient Agency hereby agrees to the following terms and conditions:

1. Commodities received under this agreement will be used solely for the benefit of those persons served or assisted by the recipient agency and will not be otherwise disposed of without prior written approval of the State Agency. Under no circumstances will U.S.D.A. commodities be sold or traded.

2. A quantity of any commodity donated for use by any recipient agency or recipient may be transferred by the sub-distributing agency or by the recipient agency to bona fide experimental or testing agency, or for use in workshops, for demonstrations or tests relating to the utilization of such commodity by the recipient agency or recipient. No such transfer by any recipient agency shall be made without the approval of the State Agency.

3. Commodities will be requested and accepted only in such quantities as can and will be equitably distributed and fully utilized by recipient agencies but not to exceed the rates established by the United States Department of Agriculture. Commodities shall not be accepted by any recipient agencies or recipients whose normal food expenditures are reduced because of the receipt of commodities.

4. As commodities become available for donation, the State Agency will notify sub-distributing agencies regarding the commodities, the class or classes of recipient agencies or recipients eligible to receive them and any special terms and conditions of donation for distribution which is attached to a particular commodity in addition to the general terms and conditions set forth herein. Every attempt will be made to deliver commodities in accordance with requested schedules. However, the State Agency shall not be responsible for delays in deliveries or for non-delivery of commodities due to any cause.

5. Commodities not distributed or used (for any reason) shall not be sold, exchanged or otherwise disposed of without the approval of the State Agency. However, commodities may be transferred between recipient agencies upon the authorization of the State Agency if determined to be in the best interest of the distribution program.

6. Sub-distributing agencies may require recipient agencies to pay part or all of the within State cost of distribution through a system of charges assessed by distributing or sub-distributing agencies. Any system of assessments operated by the sub-distributing agency shall have the prior approval of the State Agency and be subject to review by the Regional Office, Food and Nutrition Service, United States Department of Agriculture. The charges assessed shall be reasonable in relation to the services provided and the funds collected shall be used solely to pay storage, transportation, minor losses, damage or damage claims and other administrative expenses all in the operation of the donated food program. Funds accruing from the sale of containers, salvage of commodities, etc., will also be accounted for as outlined above. Receipts and expenditures of funds so accrued shall be reviewed by the State Agency periodically, but at least once each fiscal year, to determine that fund balances are not in excess of program needs.

7. If a recipient agency improperly distributes or uses any commodity or causes loss of or damage to a commodity through its failure to provide proper storage, care of handling, a claim in favor of the sub-distributing agency shall arise and recipient agency shall be subject to replacing the commodity in its distribution in kind, or pay the value of the commodity as determined by State Agency.

8. Sub-distributing agencies, and recipient agencies may employ commercial or institutional facilities to process commodities by converting them into different end products or by re-packing them. When this is done, sub-distributing agencies and recipient agencies shall be required to enter into written agreements with such processing facilities. All agreements for processing donated commodities must be submitted to the State Agency for review and approval with subsequent transmittal to the United States Department of Agriculture for approval. Donated foods may not be reconsigned to use by the processor without prior approval of the State Agency. Processing agreements shall provide as a minimum that the processing facility shall:

EXHIBIT B

BUREAU OF GOVERNMENT DONATED FOOD
PSGDF-111 (REV. 3-71)

IF FOR SUMMER CAMPS, HEAD START OR TITLE I PROGRAMS COMPLETE THE FOLLOWING:

Sponsoring Agency Eastern Pa. Lutheran Camp Corporation

Address Box 3005

City Reading, Pa.

Telephone No. 215-375-0852 Zip Code 19604

County Berks

Name Program Activity Camps Miller-Hagan & Ministerium

Opening Date 6/24/73

Closing Date 8/25/73

Location of Activity Shawnee-On-Delaware

County Monroe

Persons to be contacted during program activity:

Mr. George Rettstadt

Telephone No. 717-421-6974

Persons to be contacted during winter months:

Rev. Roy E. Gulliford

Telephone No. 215-375-0850

15. The recipient agency assures the United States Department of Agriculture and the Pennsylvania State Bureau of Government Donated Food that it now complies with and shall in the future comply with all requirements imposed by or pursuant to the Civil Rights Act of 1964 and the USDA Regulations (7 CFR Part 15), including any subsequent amendments, issued to effectuate that Act. Compliance will be consistent with the objective that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity of recipient agency to which assistance is provided by the USDA. Admission policies are understood and agreed by recipient agency to be a part of such programs and activities. Recipient agency agrees to be obligated by this assurance as long as it receives assistance hereunder or retains possession of any assistance provided by the USDA or the Bureau of Government Donated Food. Should recipient agency fail to comply with this assurance, the United States or the Bureau of Government Donated Food shall have the right to seek its enforcement by judicial or any other means authorized by law. Federal financial assistance is extended under this agreement in reliance on the representations made herein.

"Except that any termination of this agreement for non-compliance with Title VI of the Civil Rights Act of 1964 shall be in accordance with applicable laws and regulations."

The Bureau of Government Donated Food reserves the right to discontinue immediately further shipments of United States Department of Agriculture donated foods to a Donee Agency which fails to comply with the general intents and purposes set forth in this agreement, or any instructions issued pursuant hereto.

Either the Bureau of Government Donated Food or the United States Department of Agriculture, or both, shall have the right to take further action through available means when considered necessary, including prosecution under applicable State and Federal statutes or other judicial means of enforcement.

U.S.D.A. commodities will not be made available to agencies that practice discrimination in service — facilities or employment to persons because of race, color or national origin.

16. The sub-distributing agency, recipient agency, or the State Agency may terminate this agreement by giving thirty (30) days notice in writing to the other party. The State Agency may cancel this agreement immediately upon receipt of evidence that the terms and conditions thereof have not been fully complied with by the sub-distributing agency or recipient agency. Subject to such notice of termination or cancellation of the agreement, the sub-distributing agency or recipient agency agrees to comply with the instructions of the State Agency either,

a. to distribute all remaining inventories of commodities consigned by the State Agency in accordance with the provisions of this agreement, or

b. to re-assign such inventories to the State Agency, and to transmit such reports as required by the State Agency, to record disposition of such inventories.

EXHIBIT B

BUREAU OF GOVERNMENT DONATED FOOD
PSGDF-111 (REV. 3-71)

APPROVED:

PENNSYLVANIA DEPARTMENT OF PROPERTY AND SUPPLIES Bureau of Government Donated Food 2221 Forster Street Harrisburg, Pennsylvania 17125 Telephone No. 717-787-2940	NAME OF SPONSORING AGENCY Eastern Pa. Luther [illegible] Address Box 3005 Reading, Pa [illegible] Telephone No. 215-375-0852
By ______	By ______ (Signature – authorized agency official)
	Roy E. Gulliford (Please type name of agency official)
DIRECTOR (Title)	Executive Director (Title)
Date ______	Date 4/10/73

EXHIBIT B

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PROPERTY & SUPPLIES
BUREAU OF GOVERNMENT DONATED FOOD
2221 Forster Street-P.O. Box 3361
Harrisburg, Pa. 17125 Tel: No. (717) 787-2940

QUESTIONNAIRE FOR DONATED FOODS FOR 1973 SUMMER CAMP SEASON

1. Name of Sponsor Eastern Lutheran Camp Corporation

Address: Box 3005 City Reading, Pa. Zip 19604

Telephone No. (Area Code) 215-375-0850 County Berks
(Mail will be sent to above address, unless advised otherwise)

2. Name of Camp Miller-Hagan Ministerium

Address: River Road City Shawnee-On-Delaware, Pa. Zip [illegible]

Telephone No. (Area Code) (717) 588-6651 (717) [illegible]-6981 County Monroe

3. Type of Camp: (Check one): (X) Non-Profit ( ) Profit
(Check one): (X) Children only ( ) Adults ( ) Children and Adults

4. Does Camp employ a Food Service Company? (X) YES ( ) NO
Name of Food Service: Mr. George Rettstadt

5. Camp Operation: Information must be based on CHILDREN POPULATION only of High School age or below (NO ADULTS). Dates children officially arrive & depart - Not preopening & post closing activity.

A - Camping period: FROM 6/24/73 TO 7/25/73
B - Number of weeks:
C - Camp capacity: 400
D - Average daily attendance of eligible children campers: 375
E - Total number of meals served per day: CIRCLE ONE 1 2 [✓ 3]

6. Please indicate below the names of two knowledgeable persons who will be available at the camp site to maintain required records and furnish pertinent information, at the site, to Federal and/or State inspectors.

Rev. Roy E. Gulliford (NAME) Executive Director (TITLE)
Mr. George Rettstadt (NAME) Food Service (TITLE)

7. Are you receiving or do you intend to apply to any other State of Federal Agency for donated Commodities? ( ) YES (X) NO
If (YES) Indicate Agency:

8. I certify that the information furnished is true and accurate. I have received, read and agree, without exception, to abide by all Federal/State Regulations and procedures and any amendments thereto.

I agree that any failure on the part of the camp to comply will lead to a claim being made, by the State distributing agency, and on such claim demand I agree to make such restitution as will be required.

Roy E Gulliford (Authorized Signature) Executive Director (Title) [illegible] (Date)

(Prepare in triplicate - return all copies to this office)

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

Tract 1500—Synod

[Filed Nov. 5, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, ET AL., DEFENDANTS

JUDGMENT ON VERDICT

AND NOW, to wit, this 5th day of November, 1975, pursuant to the verdict of the jury returned on the 3rd day of October, 1975, and the jury having answered "no" to the Special Interrogatories filed on September 30, 1975, asking if the doctrine of substitute facilities applies, and it appearing to the Court:

1. The public use, more particularly described in the Complaint filed in the above-mentioned action, for which Tract No. 1500 was taken and condemned by the United States of America is one authorized by law and the said tract of land and the taking thereof is necessary for said public use.
2. This case is within the jurisdiction of the United States District Court for the Middle District of Pennsylvania, which has the power and authority to enter judgment.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of:

SOUTHEASTERN PENNSYLVANIA SYNOD
OF LUTHERAN CAMPS OF AMERICA

and against the United States of America in the sum of $250,000.00. The sum of $186,000.00 having been deposited into the Registry of the Court upon the filing herein of the Declaration of Taking there remains to be deposited into the Registry of the Court the sum of $64,000.00, together with interest thereon at the rate of six (6%) percent per annum from June 15, 1970, until date of deposit.

All liens, claims, encumbrances, interests and demands of every nature whatsoever existing at the time of taking are hereby transferred from the land to the fund and any and all awards of just compensation that may be made in this proceeding shall be payable and deductible from the said fund.

It is further ORDERED AND DECREED that the said sums, or any part thereof, shall be disbursed to the defendants upon the entry of this judgment, the deposit in the Registry of this Court of any deficiency, and the presentation of a praecipe either from the persons to whom payment is made, or their counsel, authorizing the Clerk to satisfy this judgment in full.

Jurisdiction is reserved to make and enter such further orders and decrees as may be necessary and proper.

/s/ Michael H. Sheridan
United States District Judge

Certified from the record
Date Nov. 5, 1975
Donald R. Berry
Clerk

For /s/ Richard M. Popovitch
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

Tract 2122—Synod

[Filed Nov. 5, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, ET AL., DEFENDANTS

JUDGMENT ON VERDICT

AND NOW, to wit, this 5th day of November, 1975, pursuant to the verdict of the jury returned on the 3rd day of October, 1975, and the jury having answered "no" to the Special Interrogatories filed on September 30, 1975, asking if the doctrine of substitute facilities applies, and it appearing to the Court:

1. The public use, more particularly described in the Complaint filed in the above-mentioned action, for which Tract No. 2122 was taken and condemned by the United States of America is one authorized by law and the said tract of land and the taking thereof is necessary for said public use.

2. This case is within the jurisdiction of the United States District Court for the Middle District of Pennsylvania, which has the power and authority to enter judgment.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of:

SOUTHEASTERN PENNSYLVANIA SYNOD
OF LUTHERAN CAMPS OF AMERICA

and against the United States of America in the sum of $300,000.00. The sum of $210,000.00 having been deposited into the Registry of the Court upon the filing herein of the Declaration of Taking there remains to be deposited into the Registry of the Court the sum of $90,000.00, together with interest thereon at the rate of six (6%) percent per annum from June 15, 1970, until date of deposit.

All liens, claims, encumbrances, interests and demands of every nature whatsoever existing at the time of taking are hereby transferred from the land to the fund and any and all awards of just compensation that may be made in this proceeding shall be payable and deductible from the said fund.

It is further ORDERED AND DECREED that the said sums, or any part thereof, shall be disbursed to the defendants upon the entry of this judgment, the deposit in the Registry of this Court of any deficiency, and the presentation of a praecipe either from the persons to whom payment is made, or their counsel, authorizing the Clerk to satisfy this judgment in full.

Jurisdiction is reserved to make and enter such further orders and decrees as may be necessary and proper.

/s/ Michael H. Sheridan
United States District Judge

Certified from the record
Date Nov. 5, 1975
Donald R. Berry
Clerk

For /s/ Richard M. Popovitch
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 70-240

Tract 2132—Synod

[Filed Nov. 5, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

564.54 ACRES OF LAND, MORE OR LESS, SITUATE IN MONROE AND PIKE COUNTIES, ET AL., DEFENDANTS

JUDGMENT ON VERDICT

AND NOW, to wit, this 5th day of November, 1975, pursuant to the verdict of the jury returned on the 3rd day of October, 1975, and the jury having answered "no" to the Special Interrogatories filed on September 30, 1975, asking if the doctrine of substitute facilities applies, and it appearing to the Court:

1. The public use, more particularly described in the Complaint filed in the above-mentioned action, for which Tract No. 2132 was taken and condemned by the United States of America is one authorized by law and the said tract of land and the taking thereof is necessary for said public use.
2. This case is within the jurisdiction of the United States District Court for the Middle District of Pennsylvania, which has the power and authority to enter judgment.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of:

SOUTHEASTERN PENNSYLVANIA SYNOD
OF LUTHERAN CAMPS OF AMERICA

and against the United States of America in the sum of $190,000.00. The sum of $144,000.00 having been deposited into the Registry of the Court upon the filing herein of the Declaration of Taking there remains to be deposited into the Registry of the Court of the sum of $46,000.00, together with interest thereon at the rate of six (6%) percent per annum from June 15, 1970, until date of deposit.

All liens, claims, encumbrances, interests and demands of every nature whatsoever existing at the time of taking are hereby transferred from the land to the fund and any and all awards of just compensation that may be made in this proceeding shall be payable and deductible from the said fund.

It is further ORDERED AND DECREED that the said sums, or any part thereof, shall be disbursed to the defendants upon the entry of this judgment, the deposit in the Registry of this Court of any deficiency, and the presentation of a praecipe either from the persons to whom payment is made, or their counsel, authorizing the Clerk to satisfy this judgment in full.

Jurisdiction is reserved to make and enter such further orders and decrees as may be necessary and proper.

/s/ Michael H. Sheridan
United States District Court

Certified from the record
Date Nov. 5, 1975
Donald R. Berry
Clerk

For /s/ Richard M. Popovitch
Deputy Clerk

PORTIONS OF TRIAL TRANSCRIPT

* * * *

[23] two other matters at this time in Court. It won't take very long. So if you don't mind returning to the juryroom, we will send for you when we are finished.

(Whereupon, a recess was taken.)

(Whereupon, five Bear Creek Deeds were produced and marked for identification as Synod's Exhibit Nos. 7, 7-A, 7-B, 7-C, 7-D, and 7-E, respectively.)

(Whereupon, a copy of minutes taken in 1962 was produced and marked for identification as Synod's Exhibit No. 8.)

WILLIAM A. JANSON, JR., called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DITTMANN:

Q Dr. Janson, where do you reside?

A North Wales, Pennsylvania, right outside of Philadelphia.

Q And what is your profession?

A I am a clergyman.

Q And how long have you been a clergyman?

A Thirty years.

Q Where, would you give us a little of your educational background, past service?

A Yes, sir.

[24] I am a native of York, Pennsylvania, and went through the public school system there and went to Susquehanna University in Selingsgrove, Pennsylvania; and to seminary in Gettysburg, Pennsylvania.

And then, I served rural parishes in Virginia for a while and I was an assistant pastor for a while in New York City.

Then, I did some graduate work sandwiched in there and got a degree from Columbia University in Education, taught for a time in Ohio and then served two parishes in Ohio and in 1961, I came to Philadelphia as an Editor for our Board of Parish Education; spent five years doing that and then took a parish in Lansdale, Pennsylvania, and from there, I became the president of the Synod.

Q Would you tell us what the function of the Synod is?

A Yes.

In our tradition, we try to group congregations together in a geographical area. We call that grouping of congregations a synod.

Now, Southeastern Pennsylvania, there are 182 Luthern congregations in the five-county area; Bucks County and Chester, Delaware, Montgomery and Philadelphia County. And that is the Southeastern Pennsylvania Synod, and my function in that is to seek to provide an opportunity for [25] these congregations to make impact in providing programs and institutions, opportunities for us to act collectively, where an individual congregation would have difficulty in acting.

Q How long have you held the office of president?

A I have been president since 1968.

Q Would you briefly describe the Northeastern Synod, in terms of its area?

A Yes, I believe the Northeastern Pennsylvania Synod encompasses twelve counties; mainly from Allentown, Easton, Bethlehem, Reading, on the south, to the extreme north, Pennsylvania border and as far east as the Delaware and I am not sure where the western boundary of that Synod is, but it encompasses about twelve counties.

Q What is the function of the Lutheran Church Camp Corporation?

A Well, about fifty-some years ago, some of the leaders in the Lutheran church felt that camping would provide a unique opportunity for young people. They decided that this would give them a chance to do a variety of things.

First of all, I think that it would help them, a young person grow in his love of God and Country as he would spend some time in the out-of-doors. He would have a good opportunity of learning about nature and would have a good opportunity to appreciate the land in which he lives, like going to bed when the crickets are chirpping and studying the [26] trees and the flowers and that kind of thing. So the Camp Corporation, in our tradition, has been one that has carried a very important part of the program for growing boys and girls.

I think that the Camp Corporation also is very important because we have an opportunity for our young people to mix, from various sections of these two Synods. Boys and girls from the city relate to boys and girls from the country. Small-town children relate to others whom they meet and sometimes they form very lasting friendships. And they learn something about the way they relate to other boys and girls.

The Camp Corporation also is quite concerned about the fact that children from the ghetto area and boys and girls from the rural areas have a chance to mix and become known.

We also like to feel that we are working with children who have learning disabilities and some who have difficulty in their homelife. So this is a kind of mix that the Camp Corporation attempts to administer so in that sense, it plans its programs and conducts its activities; so, it is really then a system of providing an educational, religious, charitable experience for boys and girls of Northeastern Pennsylvania.

Q What are the names of the camps that were owned by [27] the Synod prior to the date of taking?

A Camp Miller, Camp Hagan and Camp Ministerium.

Q And where were those camps located?

A Along the Delaware, Shawnee on the Delaware area.

Q Has the Northeastern Synod participated in the funding of the camp program.

A Yes, sir, both synods have.

I think the jury might appreciate the fact that prior to 1968, the Northeastern Pennsylvania Synod and the Southeastern Pennsylvania Synod were one, called the Eastern Pennsylvania Synod, and so prior to 1968, obviously, the Eastern Pennsylvania Synod supported the camping program.

When we divided ourselves into two synods, then this became a function of both synods. So since 1968, both synods have supported the camping program. We do this collectively because it is economically feasible. It makes sense to do it together.

Q What have been the financial results of the operation of the camping program, by the church?

A Well, yes, we have always had to subsidize it. It has never been a profit-making enterprise since I became president in 1968. The amount of money that both have put into the camps has risen from $13,000 to approximately $30,000 this past camp season.

Q Would you identify the Lutheran camps, the Camp * * *

* * * *

[31] MR. DITTMANN: Well, I assume it will be possible to have them brought down here although, well, work out something else, access to them.

(Whereupon, the discussion at side bar was concluded.)

BY MR. DITTMANN:

Q I show you an exhibit marked Synod's Exhibit No. 8 and ask you what that is, Doctor.

A This is a copy of the minutes that were taken, in 1962, authorizing the appointment of a committee to study the selection of campsites.

Q Is that a true and correct excerpt from the minutes of that meeting?

A Yes, sir.

Q Would you please read to the jury the excerpt?

A Yes.

"The president explained that because the dam will be built at Tocks Island in the Delaware River above Shawnee, the three summer camps will be flooded and new sites will have to be obtained. Upon his recommendation, it was resolved:

A. That the president be authorized in consultation with the Board of Christian Education to appoint a committee on the selection of camp sites.

B. That the committee be composed of three representatives of the Board of Christian Education and two [32] representatives of the Executive Board.

C. That the committee be authorized to consult with the Financial Committee of this Board in the preparation of a plan to finance the purchase of the campsites.

D. That the committee subject to concurring action by the Financial Committee and the approval of the Synod's legal counsellor be authorized to take the necessary steps to protect its interest in any specified property, pending formal action by this Board and;

E. That the Board of Christian Education be authorized to spend up to $10,000 of its funds in developing surveys and plot plans to guide the committee in its choice of sites."

Q Now, Dr. Janson, do you know whether or not a campsite was subsequently selected and acquired by the Synod?

A Yes, I do.

Q And do you know when that occurred?

A Somewhere in the year 1963, 1964.

Q And do you know the location of the campsite?

A We refer to it as Bear Creek Camp Site.

Q And where is Bear Creek?

A Well, it is off around 115, just one exit beyond the Scranton interchange, off the Northeast Extension.

Q Do you know how many acres comprise the Bear Creek site?

[33] A Well, when we bought it, we thought we were acquiring 3500 acres and then it was necessary to survey the area that we bought and we picked up 300 acres. So we now have 3800 instead of 3500.

Q Do you know the total cost of the Bear Creek site?

A Yes, I think it was approximately $321,000.

THE COURT: Synod's Exhibit No. 7 to 7-E, are admitted in evidence.

BY MR. DITTMANN:

Q And those, Dr. Janson, are copies of the deeds conveying the Bear Creek site to the Synod, are they not, sir?

A Yes.

Q And by that, I am referring to Exhibits No. 7 to 7-E.

A Right.

Q Now, Dr. Janson, do you know the date when the three Delaware River camps of the Synod were condemned by the United States?

A I believe that was 1970, that the formal condemnation took place.

Q Would you tell us why the Synod has not proceeded to construct new, to develop a complete new campsite, at the Bear Creek location?

A Yes, I think this long time has become a reality probably for two factors.

I think, first of all, we were hoping that the * * *

* * * *

[39] hereafter referred to as the Church. The corporation shall be in adherence to such Church or its lawful successor and amenable to its laws."

Q Now, in that connection, would it be fair to say that in promulgating the camping situation, the Camp Committees would be trying to adhere to that purpose, under that corporation?

A Yes.

Q May I have them back; they are basically the same. That is the later amendment, is it not?

THE COURT: What is the number, Doctor?

A 33-A is on the yellow tag.

This is entitled, "Articles of Amendment of the Eastern Pennsylvania Synod of the Lutheran Church in America."

Q Now, that is changing the name again, is it not; in 1969, I believe?

A Yes.

Q The date on that is 1969, is it, sir?

A The date of that is 1969.

Q And underneath that paragraph, changing the name, there is another paragraph again setting forth the purposes of the organization.

A Yes.

Q And would you read that paragraph?

A Yes, it is starting with the four again.

[40] "The purpose of the corporation is to promote the Christian religion according to the tenets of faith as set forth in the laws of the Lutheran Church of America, hereinafter referred to as the Church. The corporation shall be in adherence to such Church or its lawful successors and amenable to its laws." Number five, "Corporation shall not contemplate pecuniary gain or profit incidental or otherwise to its members." And six, "The corporation shall have perpetual existence." Seven, "The corporation is organized on a non-stock basis."

Q Now, to your knowledge, there has been no other changes in the name?

A That is correct.

Q And that would still be in effect today?

A Yes.

Q And would have been in effect in June, 1970?

A Yes.

Q Just while we are on that for a second, that paragraph dealing with, it does not contemplate pecuniary gain or profit, that is to qualify it under a religious corporation, is it not?

A That is my understanding.

Q In other words, if you made profit, you would have to start paying taxes?

A I am afraid that is the case, yes.

[41] Q Okay, may I have it back.

Would it be fair to say, in your opinion, that in conducting the camps, say for the period from 1962 up to 1970, that the camps did act in a way to promote the tenets and the teachings of the Lutheran Church of America?

A I believe so.

Q In other words, do you know for a fact that the children, up until 1970, anyway, the majority of the children that attended the camps were of the Lutheran faith?

A I believe I would like to ask the Executive Secretary to document that. I don't believe the term majority is quite accurate. There is always a shifting from year to year. Sometimes it is fifty/fifty. Sometimes it could be 55/45. The term, majority, throws me a little bit.

Q Well, there was an affidavit submitted in this proceeding by the Reverend Gulliford, that you mentioned, which is on file with the Court and I believe he states that under paragraph seven on page five, that in 1965, the percentage of Lutheran children attending the camps was 59 percent and non-Lutherans were 41 percent.

Then, in 1966, it was 60 percent for the Lutheran, of Lutheran children, children of the Lutheran faith and 49 percent for non-Lutheran children.

A Right.

Q That in 1967—

* * * *

[53] REDIRECT EXAMINATION

BY MR. DITTMANN:

Q Dr. Janson, do you, is the camp operation by the Synod as previously described by you, consistent with the purpose of the Synod as stated in the charter documents that were shown to you earlier?

A It would be my conviction, yes.

Q And would you explain why you think the two are consistent?

A Yes, well, I think the reason they are consistent is because of the philosophy of camping that has evolved and emerged. It is a very personal style of camping which there is a very close relationship between the counsellors and the campers. There is an effort to, you know, communicate about the world and about creation, about the presence of God. There is an effort to talk about Christian values and as they relate to life. So, you know, with that kind of programming, I would say it is consistent when it talks about the articles of incorporation, about the tenets of the Lutheran confession.

Q Dr. Janson, do you have any idea of the amount of money that has been invested in the Bear Creek site, to date, in improvements?

MR. RUVOLO: Objection, Your Honor.

THE COURT: No, I think in view of the cross examination, that is relevant; overruled.

* * * *

[57] A I was at the United Church of Christ Conference Center, but no full-blown denominational church camp.

Q How about non-denominational camps or private camps, sir?

A No.

Q You have had no occasion to visit them?

A No.

MR. RUVOLO: No further questions.

THE COURT: Next witness.

ROY GULLIFORD, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DITTMANN:

Q Where do you live, Pastor Gulliford?

A I live in Berks County, suburban Reading, Pennsylvania.

Q And how long have you resided in that area?

A Since 1964.

Q And what is your educational background?

A I am a product of the schools of the City of Philadelphia, attended Gettysburg College in Gettysburg, Pennsylvania. Then, went on to the Lutheran Theological Seminary at Philadelphia where I received my Bachelor of Divinity and was ordained as a minister of the Lutheran Church of America.

Q And when was that?
[58] A 1959.

Q And what has your career been since 1959?

A I served briefly as an assistant pastor in Philadelphia. In 1960, assumed for the first time my own parish in Chester County, a town called Lionville. I was there for four years, took six months off to get an additional decree and then served as pastor of Reformation Lutheran Church, Refton, suburban Reading, until 1970, when I was called by the Synod to serve as Executive Director of the Lutheran Camp Corporation.

Q And you are today the Executive Director of the Camp Corporation?

A Yes, I am.

Q What are your duties and responsibilities as Executive Director of the Camp Corporation?

A I am responsible for the working in conjunction with the Board in selection of the personnel, directors, staff, responsible for the oversight of the programs, the care of the facilities and of course, to the best of a clergyman's ability, the fiscal concerns of the corporation.

Q Would you tell us again to whom you report?

A I am responsible to the Camp Corporation Board.

Q And that Board is made up of what?

A Laymen and pastors, chosen by the Synod to oversee the camping operations. I am their employee.

[59] Q And when did you assume that office?

A March 1, 1970.

Q Do you know the date when the United States condemned the three camps that we have referred to before?

A We were informed of the condemnation in August of 1970. At that time I was told that was backdated to June 1 of 1970.

THE COURT: Maybe we can get that in by stipulation; can't we? What is the agreed date?

MR. DITTMANN: Of taking, Your Honor, June 15. June 15 was the date it was taken.

BY MR. DITTMANN:

Q What other, since you were named as Executive Director, have you had any other camping experiences and activities?

A Yes, I was part of a, what was called the Eastern Pennsylvania Task Force. This was an ecumenical study of fifteen camp sites owned by Protestant churches in Eastern Pennsylvania. It was an attempt to study their sites, their programs, their philosophies, to see where things could be done jointly and to develop an overall plan for the '70's, in which we could more cooperatively work and thus have more impact and accomplish more. I was on that steering committee.

I was also invited by a sister Lutheran body, the American Lutheran Church, to be one of three who studied the [60] same sort of thing for the Pittsburgh camps of the ALC, Camp Agape. I am presently serving on the Convention Committee of the American Camping Association, Chairman of the In Depth Seminar Committee for the National Convention which will be held in Philadelphia this March. I am responsible for determining what the content of the seminars will be and in conjunction with the committee, chosing the people who will lead those seminars.

Q As Executive Director, were you familiar with the operation of Camp Miller, Hagan and Ministerium in 1970?

A I was serving as Executive Director at that time and Director of Camp Ministerium.

MR. RUVOLO: Excuse me, I didn't hear the last part.

A Also, Director of Camp Ministerium, the middle camp.

BY MR. DITTMANN:

Q I would like you to describe in detail to the jury, first of all; tell us about Camp Miller, where was it located?

A Camp Miller was about three miles north of the Shawnee on the Delaware. It was, I believe, 140 acres, 55 buildings, handled, could handle up to 260 campers with a staff of 68. Half of the site was river bottomed right along the river. The balance of it was going on up the mountain. Could I show that?

[61] Q Yes.

I show you a large photograph which I am going to have marked for identification in just a minute and ask you whether this shows Camp Miller?

A Upside down, but it is Camp Miller.

Q Now, what do you mean by upside down?

A They reversed the photograph. It is Camp Miller, but it is, I guess when they put it on the poster board, they twisted it somehow. Somehow, it gets everything backwards.

(Whereupon, a photograph of Camp Miller was produced and marked for identification as Synod's Exhibit No. 1.)

BY MR. DITTMANN:

Q This has been marked Synod No. 1. Now, Synod No. 1, that is a picture of Camp Miller, you say it is upside down?

A Yes.

Q And this is an inversion, I guess, that has been created by the photographer?

A In making the poster, yes.

Q How does that affect the picture?

A Well, the river is still on the east and the mountains are still on the west, but the north end of the camp is on the south and the south end of the camp is on the north. I don't know whether you want to pursue that or not.

Q In other words, if you were approaching the camp [62] from the river, you would by airplane as this picture does, you will actually see the buildings up here to the right side and the open area would be to the left side?

A Yes.

Q Do we have a smaller picture that has been done correctly?

A A little eight by ten is in the library.

Q In a minute, we will get that.

Now, supposing I hand you Synod No. 1 and then I am going to ask you a little bit more. About how many buildings did you say comprised it?

A Fifty-five buildings on the Miller site.

Q What kind of buildings were they?

A They were a variety of buildings, of course, that you would need for a camp. Originally, Miller was a farm and we had the farm house and barn and we were able to keep some of the area in farming so that some of the campers could see what farming is all about. Many of our campers are from Philadelphia and one boy asked how you could tell a bull from a cow. He didn't know which were male and female, so it was helpful to see a bit of a farm that campers could see things firsthand. There were tennis courts, of course, large playing fields, atheltics were always a large part of the program.

A large dining hall facility, that could comfortably accommodate 300. There was an infirmary, an arts and crafts [63] building, fully equipped.

These actually are on the south. They were some of the original cabins built back in the 1920's. All of these cabins were built in 1965. They were all replacement cabins. This whole string, I believe of fifteen cabins, so that when we say that the camp was established in 1927, the buildings, of course, continues as you grow and expand, you develop your facilities. A major portion of the program was here on the mountain where we could have all kinds of nature—

Q And by the mountain, you are referring to that wooded area shown on the left?

A Yes, the mountain goes at about a 45 degree angle on the far said of the township road so that this was used quite extensively for camping. It was a convenient place for the youngest campers to be away just for one overnight.

This, of course, is the river.

Q Would you tell us again the number of campers that were accommodated?

A Camp Miller could accommodate 260 campers plus 68 staff.

Q And prior to 1970, what kind of children were served by Camp Miller? What was the sex of the children?

A Oh, I am sorry. They were all boys. Miller was an all boys' camp and had been since is inception in 1921. We had boys coming back third generation. They would come back [64] and their fathers could show them on the rafters where they had put their initials when they were campers in some of the older cabins. So it was always a boys' camp and exclusively a boys' camp.

The water front program was extensive. With the river, as we have it, we had very gentle parts of the river where the youngest campers could learn to canoe and as they became more adept at canoeing and had completed their instruction in canoeing and swimming, we would expand their trips, taking them all the way up to Narrowsburg, New York and bringing them through White Water, being able to come right back down to our site.

Q How far is Narrowsburg?

A Golly, I'm not sure.

Q It is in New York State?

A Again, it is on the Delaware, so it separates Pennsylvania and New York, but it is up above Port Jervis, so it is, I would guess it is maybe 10 or 15 miles above Port Jervis. So it would be 40 to 50 miles from the site.

Q How far is Port Jervis by road from the camp?

A It is about an hour's ride, I don't know the mileage.

Q Going upstream from Camp Miller to the, what was the next camp?

A The next camp was Camp Ministerium.

Q How far was that from Camp Miller?

[65] A They were separated by a farm and a couple of houses, probably about two miles.

Q And what was the method, what was the connection, method of travel between Camp Miller and Camp Ministerium?

A The road, of course, paralleled and connected the camps on the western side and the river was our connection on the eastern side.

Q And you say the road ran along next to the wooded area?

A Yes, the road, you can just see a bit of the road here at the edge of the farm. It comes along here. It is in the valley itself coming out of Shawnee and then continues on up and Ministerium would be just out of this picture.

Q Tell us a bit about Camp Ministerium. What is the acreage and terrain at Camp Ministerium?

(Whereupon, a photograph of Camp Ministerium was produced and marked for identification as Synod's Exhibit No. 1-A.)

BY MR. DITTMANN:

Q And I will hand you a second air photograph which has previously been marked for identification as Synod No. 1-A and I ask you if you can first of all tell us what that photograph represents?

A This photograph represents, again, an aerial view, looking down over the camp, looking over the Delaware towards [66] Port Jervis, shows you the area the government would like to make a lake. The Camp Ministerium facility was originally a farm.

Q By the way, let me interrupt you.

A Yes.

Q Do you know when the photograph previously marked as Synod No. 1 was taken?

A No, I do not. These were photographs taken for the purposes of producing a postcard that kids could send right home from camp and these were, I am guessing from what I can see—

Q Don't guess.

A They had to be in the late '50's or early '60's.

Q Was it made before 1970?

A Oh, yes. I would guess the late '50's, early '60's.

Q And would that same answer be true of a photograph of Camp Ministerium that you now have before you?

A Yes, yes. Ministerium was originally a farm and many of its buildings historical.

Q First of all, tell us the size, the number of acres involved in Camp Ministerium.

A I believe there are 182, something over 180 acres at Camp Ministerium. There were 37 buildings. Ministerium could, at the time it was developed, handle comfortably 120 campers and a staff of 32. It was purchased by the Synod in [67] 1947 and developed in the years after that time.

Q Now, tell us the kind of program that was conducted at Camp Ministerium.

A Ministerium originally was what we called leadership training. This is where young people and originally, adults, were brought to camp for a week, choirs were brought to camp for a week, for a variety of schools that was an attempt to develop the leadership within the congregations.

In the mid '60's Ministerium started and was the vanguard of a new kind of program called small group camping. Small group camping is an attempt to bring together youngsters from very different backgrounds of different races, of different creeds, city kids, urban kids and bring them together and have them, their task for the week is to learn to accept each other, to meet each other as people. We feel that the gospel is a gospel of love and that this gospel applies whether you are Christian or not. There is a need to meet and accept people and to love people for what they are and so the task at this site is for youngtsers to do exactly this. We use the boating and canoeing at this site. We used the backpacking to teach them and to have living experiences of what they talk about in church school.

In a sense, Ministerium was a laboratory for church school. It is like studying a frog and never cutting one up, if you don't have a lab to go with what happens in the class- [68] room. So, in a sense the camp is the lab for what happens in church school and this is the program that has been developed at Ministerium. It has now spread really across the nation and in this last year, I have been in contact with people in California and New Jersey, who want to know more about the development of this program because they are very interested in what is happening here.

Q What is the status of Camp Ministerium today?

A Well, the Ministerium facility in 1973—

MR. RUVOLO: Objection, Your Honor, date of taking would be 1970. I think it is irrelevant.

THE COURT: Yes, I think so.

BY MR. DITTMANN:

Q How long did you continue to operate Camp Ministerium?

A The last season of operation was the summer of 1973, at this site.

Q And where has Camp Ministerium been operated since 1973?

MR. RUVOLO: Objection, Your Honor.

THE COURT: I will permit it now. I can see the relevancy now.

A Camp Ministerium, for the last two summers has been located at the new Bear Creek site in a retreat facility and it is the temporary headquarters. We have supplemented the retreat facility with tenting facilities so that we can continue [69] to run this program.

BY MR. DITTMANN:

Q Continuing upstream from Camp Ministerium and by the way, is that picture of Camp Ministerium that you have just referred to, is that inverted by the photographer?

A No, that one is right.

Q That is a true representation?

A That is a true representation.

(Whereupon, a photograph of Camp Hagan was produced and marked for identification as Synod's Exhibit No. 1-B.)

BY MR. DITTMANN:

Q Now, I show you Synod's No. 1-B and ask you what 1-B represents?

A This is Camp Hagan. Again, east and west are east and west, but north and south are not north and south. Again, the transparency, I think has been flipped over. But the road comes in, the road that came past Miller and Hagan, then branched, one branch of the road went out to Bushkill and the other branch of the road continued here as a township road. I believe, the first part was a state, now this becomes township road. Continuing on past and a back road to Bushkill, again giving us access directly to our site. This is the road into the site.

Q Tell us how big the Camp Hagan site is.

[70] A I believe, forty acres and 34 buildings.

Q What were the improvements that were, that were existed thereon, when the property was condemned?

A All right, this site was purchased in 1937. Through '37, '38, the beginnings of the cabins were established. Building continued as funds were available and as it was necessary, again, up into the 1950's when this large building—

Q Now, you are pointing to a building in the center of the exhibit?

A Yes, this is something called the Corn Crib. It had a full stage for theatrical production. It was a concrete floor, a place where the kids, campers could go in inclement weather and also to stage productions. One of the last ones they did was "How to Succeed in Business."

This was one of the last buildings. Also built was this arts and crafts building.

Q That building is located where in terms of the photograph?

A On the back of the river. It is the white roofed building right here (indicating). And the arts and crafts building had a large stone fireplace, has a, still there, large stone fireplace and of course, kilns for ceramics

and all the supplies necessary for a complete arts and crafts program.

Q What was the capacity of Camp Hagan?

[71] A Camp Hagan can take up to 240 with a staff again of 68. Camp Hagan was a girls' camp. It was the sister to Camp Miller, the boys' camp.

Q How long, what is the operational status of Camp Hagan as of 1975?

A Camp Hagan was in operation in 1975, but now, temporarily, called Miller-Hagan because of the loss of the Miller site. We combined the two programs on the one site. It is the holding action until all these things are resolved so that we can get going again.

Q What happens, what is the operational status of Camp Miller?

A At the time of condemnation in 1970, we had expected to continue to run all three of the camps. We had felt that there would be some arrangement that could be made because though the government had been saying for ten years they were going to build a dam, there still wasn't anything happening and we had hoped that we would be able to continue until we could get just compensation and move out of the valley.

Unfortunately, there is tremendous vandalization of this site. It was awful. We had hoped, it became clear by mid-winter that we could not run a program here. Everything you can imagine was smashed or stolen. We had hoped at least to have one last father-son weekend so that fathers and sons could come back and what have you. It was impossible. The [72] site was too vandalized, too badly damaged and so we just had to walk away from it and merge the two camps on the Hagan site and hold the corps of our staff and hopefully the corps of our campers until we could move onto Bear Creek.

Q Did you give the distance from Camp Ministerium to Camp Hagan?

A A mile and a half, two miles.

Q What was your function as Executive Director in relation to these three camps that you have just described?

A May I sit down?

Q Yes.

A I was responsible for the on-site control. In other words, I represented the Board, the Camp Corporation on site. The programs, the staff, I was responsible for hiring the directors of the sites and just general oversight on a day-to-day basis for the season of the summer camping program.

Q How were these camps operated in relation to each other?

A Programatically, they were independent. They ran their own separate programs, but originally, we were one operation. We did common purchasing, as Executive Director; I live at the center camp and oversaw, you know, just a mile or so in either direction, could see what was happening on the other sites, could participate in programs at the other sites. Our vehicles, our full-time people, all of us were [73] responsible for all three sites and with that short distance between, it was a very simple thing, it was really almost like one campus.

MR. DITTMANN: If Your Honor please, would you indulge us for just a minute now?

THE COURT: You would like to recess now? We will have a recess. Before we recess, Members of the Jury, I have your mileages here. Would it be inconvenient for any of you to stay until five o'clock? Do any of you have any transportation problem? If you do, tell me. I would be glad to cooperate. One final thing, what about some mornings we would like to start at 9:30? Would that make it inconvenient? We will recess. We usually have one recess in the afternoon.

(Whereupon, a recess was taken.)

(Whereupon, Roy Gulliford resumed the witness stand.)

(Whereupon, a photograph of Camp Hagan was produced and marked for identification as Synod's Exhibit No. 1-C.)

BY MR. DITTMANN:

Q Pastor Gulliford, I show you a photograph which has been marked Synod's Exhibit No. 1-C and ask you whether you can identify that photograph and what its relationship is to another photograph that has previously been marked?

* * * *

[87] 25 canoes, a few row boats that are used really for lifeguarding and something called playaks; there are thirteen playaks at Miller/Hagan and I think six, no, there are nine at Ministerium. A playak is a plastic, like a kayak, eight feet long and they were gotten for the youngest campers. So often older campers, young campers only sit in the middle of a canoe and they don't get a chance to do things for themselves, so they were gotten so that these youngest campers could paddle around in a safe area and do things for themselves instead of having them done for them. That was basically our purpose.

Q Directing your attention to the program that was conducted at the camps, would you give us a typical day, day's schedule at Camp Miller?

A Okay, I could really combine Miller and Hagan because they were much the same, always have been.

The day would begin at quarter of eight and by eight o'clock the youngsters would be standing at the flag pole for the flag raising. Then, go into breakfast. Following breakfast, it was clean up the cabin time. They called it cabin capers and then at nine o'clock they would have their first class which might be arts and crafts, it might be water front, it might be boating, you know. It could be anyone of a number of departments including nature and religion.

MR. RUVOLO: I didn't hear what he said.

[88] THE COURT: Including nature and religion.

A Including nature and religion. There are five departments.

There would be a break and in the second class, they would have three structured classes each day. Everybody would be at the water front at least once. They would be in canoes or canoeing program, at least four to five hours a week. This might be lumped together because you need more time to teach that sort of thing.

In addition to the regular classes, there were clubs. The youngsters could chose a variety of things from, there was a water front club and they did scuba diving in the river and flipped over rocks to see what crayfish they could find and what have you. A fishing club, the youngsters would be shown and taught in the nature department the kind of fish that are in the river, the best way to catch them and then they would go out in the canoes and try to catch them. If they had any luck, they were brought back and the cook fried them for them.

So that there would be clubs and these clubs would include poetry or gymnastics or water front or fishing. So the day was partly structured and partly built on the basis of each youngster's particular interests.

The day would conclude with dinner and then an evening activity and cabin devotions and then, hopefully, to [89] bed, if we were lucky to get them into bed. That would be a basic day at Miller/Hagan.

(Whereupon, a photograph of playing field was produced and marked for identification as Synod's Exhibit No. 5.)

(Whereupon, a photograph of soccer game was produced and marked for identification as Synod's Exhibit No. 5-A.)

(Whereupon, a photograph of girls' senior area was produced and marked for identification as Synod's Exhibit No. 5-B.)

(Whereupon, a photograph of Great Hall was produced and marked for identification as Synod's Exhibit No. 5-C.)

(Whereupon, a photograph of boys returning from fishing was produced and marked for identification as Synod's Exhibit No. 5-D.)

(Whereupon, a photograph of soccer game was produced and marked for identification as Synod's Exhibit No. 5-E.)

BY MR. DITTMANN:

Q Now, Pastor, I will show you a final group of photos, number Synod's No. 5 to Synod's No. 5-E, which relate to program and activities and ask you to briefly tell the jury what each of these photograps shows and then we will [90] circulate those pictures.

A This is one of the playing fields.

Q What number is that, please?

A I have forgotten, No. 5. We are looking with our backs to the river, looking toward the mountain across a playing field. This happens to be a baseball field. The arts and crafts building is here. Some youngsters are going to a fishing class. They have got their poles. We happen to have another shot of them coming back and Mr. Ruvolo noted that they didn't have anything. Maybe they didn't catch anything, I don't know.

Q By the way, the pictures, of course, were taken in 1975?

A Yes, the same day.

Q Do they represent the same things that were true in 1970?

A No change in the conditions in that picture at all.

Q How about . . .

A In succeeding pictures, I am looking.

Q How about co-educational features?

A Oh yes, it is now boys and girls.

Q But essentially, the program and activities remained the same?

A Yes, remained the same.

Q Okay, would you please continue.

[91] A This is 5-A and this shows a soccer game going on in the background. You can see a tower that the senior boys erected as part of their lashing project. It was thirty-some feet high and they were pretty proud of lashing the whole thing with no nails. They went on to build an eighty-five foot rope bridge after that.

This shows the girls again.

Q What number, please?

A 5-B, this shows the girls' senior area. The senior campers don't have quite the structured program that the younger campers have. They set their own pace a lot more, spend a lot more time backpacking and canoeing and being on and off the site.

This is simply, this is not a structured activity.

Q What number is that, please?

A 5-C.

Q What does that show?

A This shows a portion of Great Hall and a misuse of the water fountain which was happening all the time. Some of the youngsters on free time, just horsing around. This again, shows the same.

Q That number is what?

A 5-D. Again, the same shot, the same boys happen to be coming the other way with their fishing poles, not having gotten anything.

[92] And 5-E is another soccer game going on.

Q All right.

MR. DITTMANN: With the Court's permission, I would like to circulate this.

THE COURT: Yes.

(Whereupon, Synod's Exhibits No. 5 through 5-E were circulated among the jury.)

BY MR. DITTMANN:

Q Pastor, do you know whether or not any ratings or evaluations have been made of the camping program of any of the Synod's camps?

A Camps Miller and Hagan were members of the American Camping Association and as members must be evaluated and on-site evaluation in regular basis. The last of those was done in, I think, 1971, 1972, around in that area. We received a rating out of a possible 100, we received a rating of 85.

Q What is the American Camping Association?

A The American Camping Association is, to my knowledge, the only nation-wide organization devoted to watching over and increasing the professionalism of camps, not just church camps, but independent camps, agency camps, any kind of camp and to my knowledge, involving young people and providing standards so that parents can know what sort of camp they are sending their youngsters to.

Q Now, Pastor Gulliford, what qualifications, if any, [93] are necessary to be eligible to attend any of the river camps?

A Simply, age. Youngsters at Miller/Hagan are eligible between the ages of 8 and 16, and at Ministerium, 9 to 17.

Q And how are applications received for the camps?

A On a first-come, first-serve basis.

Q Are there any restrictions as far as race, color or creed?

A No, no.

Q Is there any policy of giving preference to any particular religious affiliation?

A No.

Q Do you have any data with respect to the religious distribution of campers?

A I believe my office, I supervise my office, putting that sort of information together, yes.

(Whereupon, a breakdown of Lutherans and non-Lutherans was produced and marked for identification as Synod's Exhibit No. 9.)

BY MR. DITTMANN:

Q Pastor, I show you an exhibit previously marked Synod's Exhibit No. 9 and ask you what that represents; take the stand, please.

A This represents the breakdown of Lutherans and non-Lutherans at the camps. At Camp Miller and Hagan, from 1965 [94] to 1969 and then, when I became Executive Director and we incorporated, we began for the first time to keep the records for Ministerium as well and so from 1970 through the end of this season, it represents the number, the percentage of Lutherans and non-Lutherans at all of our summer operations.

Q Including Bear Creek?

A Yes.

Q As far as 1975 is concerned?

A Yes.

Q And these, this exhibit was prepared under your supervision?

A By my office, yes.

Q By the way, what was the distribution in 1965 between Lutheran and non-Lutheran?

A Fifty-nine percent of the campers were Lutheran, forty-one percent of the campers were non-Lutheran.

Q And what was the distribution in 1970?

A Forty-three percent were Lutherans and fifty-seven percent were non-Lutherans.

Q And what was the distribution in 1975, including Ministerium?

MR. RUVOLO: Objection, Your Honor.

THE COURT: Overruled, You may state it.

A Forty-nine percent of the campers this season were Lutheran and fifty-one percent were non-Lutherans.

[95] BY MR. DITTMANN:

Q Now, what efforts have been made by the Camp Corporation to serve children with special needs and/or with special problems?

MR. RUVOLO: Your Honor, may we have a date on that as to what period of time he is talking about?

BY MR. DITTMANN:

Q At or prior to the time of the condemnation?

A At or prior to the time of condemnation, I am at a loss to speak because I was not a part of the camp at that time. The camps were, as Dr. Janson indicated, under a committee of the Synod and so it was a variety of the Synod boards and agencies that worked with the camps at that time but I was not a part of it then.

Q Well, since you have been Executive Director, what kinds of specialty of campers has the camps served?

MR. RUVOLO: Objection, Your Honor.

THE COURT: Overruled.

BY MR. DITTMANN:

A Well, we have always felt that a part of our ministry was to special need campers. Just down the road from us is Camp Wyomissing which was an underprivileged boys' camp in the City of Philadelphia and it was my introduction to the Poconos. I was one of those boys. So I was always especially interested in seeing these kinds of programs [96] developed. I think it ties in clearly with our Lutheran theology which is reconciliation, getting people to meet and talk with each other so that we have made a concerted effort to involve ourselves in a variety of programs. Some start out as experiments and they work well. Some of them don't. We have had retarded children, children who are retarded, I am told to say these days, from White Haven State School with very low I.Q.'s. Last summer a thirty-seven year old woman was with sixteen year old high school students in the Ministerium program, but she functioned on their level. We have had retarded people from institutions such as White Haven. We also regularly receive inquiries from parents of exceptional children, asking if we will take them. We usually ask that we receive a write-up on these youngsters from their doctor, their therapist, their counsellor and if agreement is reached, these youngsters are accepted into camp, if it is felt that they can be benefited by functioning in a normal program. Most camps have special weeks for exceptional children. I don't happen to believe in that. We like to involve our youngsters in the on-going programs and we have had a good deal of success. We have had some failures. Some youngsters that we think are going to make it have to be sent home. Others make it. A boy with cerebral palsy this year swam the creek, took him all week, but he made it. So that we have had a regular on-going program with the exceptional [97] children from White Haven State School, from Silver Springs Institute, suburban Philadelphia. These were youngsters with learning difficulties. This was a program that didn't work. These youngsters were too hyperactive for us to handle and so we had to terminate that one.

Q What about underprivileged children?

A Again, since we were incorporated, we have the records. Prior to that, it was part of the on-going work of the Synod, and we began what we call a campership program as a corporation in 1970, having nothing to do with condemnation, but with mission and at that time we made an appeal to the congregations of the Synod to send us money that we could use to bring underprivileged youngsters into the camps. Our budget did not allow us to directly handle this out of on-going receipts and so we had special appeals. This is continued to the point now where some of these youngsters have been with us five and six years. Some were in the counsellor and training programs and one boy with two arrests out of Wilkes-Barre is not a part of our year-around staff. So this had been going on since 1970.

Q This campership program serves children in what areas?

A In the Southeastern Pennsylvania Synod area, it serves children from what we call Center City Lutheran Parishes. This is an association of the parishes, Lutheran parishes in [98] the center city, Philadelphia, center city, through grants from agencies and through an appeal from Dr. Janson, sends a large number of campers, I don't have the stats, right before me on how many they send. It also includes underprivileged youngsters from Allentown, Bethlehem, Wilkes-Barre; sometimes we find a pocket. A pastor will contact us and say he knows of a family and this summer we had an underprivileged boy from North Wales, which is a rather affluent area, but we let the local agencies or pastors recommend these youngsters to us.

(Whereupon, a document dealing with underprivileged campers was produced and marked for identification as Synod's Exhibit No. 10.)

BY MR. DITTMANN:

Q I show you a document marked Synod's Exhibit No. 10 and ask you whether that was prepared by you or under your direction?

A Yes.

Q And what does that show?

A This shows this program starting in 1970 and up to this past season, 1975.

Q And how many campers were served, underprivileged campers were served in 1970?

A First year of the program there was 92 campers who attended our camps for 149 weeks.

[99] Q What do you mean, Pastor, by 92 campers for 149 weeks?

A Okay, we deal in what we call camper weeks because our Miller and our Hagan programs have traditionally been two-week programs: Our Ministerium program has always been a one-week program so for administrative purposes, we deal in camper weeks. A youngster can come to Miller or Hagan for, must come for at least two weeks, but can stay longer. At Ministerium, because of the demand, people are only allowed to stay at Ministerium one week, but so when we talk about camper weeks, we are saying that 92 youngsters stayed a total of 149 weeks, some for two weeks, some for one week.

Q By the way, how many, what is your date for 1972?

MR. RUVOLO: Objection, Your Honor.

THE COURT: Overruled.

BY MR. DITTMANN:

A 1972, there were 115 campers for 208 weeks.

Q And for 1975?

MR. RUVOLO: Objection, Your Honor.

THE COURT: Overruled.

A 228 campers for 364 weeks.

BY MR. DITTMANN:

Q What is the relationship between the camp program and the Tri-Square Masonic Program?

A The Tri-Square Masonic group had owned their own [100] camp. This was lost in a condemnation procedure, also, and instead of re-establishing themselves, they sought out and examined a variety of camping programs and chose one to which they would send, I believe, underprivileged boys and the program they chose was Camp Miller and now, they continue to be involved in Camp Miller-Hagan.

Q And do you know when that program began.

A No, I do not.

Q Had it begun prior to your becoming Executive Director of the Camp Corporation?

A Yes, it had.

Q Is it continuing today?

A Yes.

Q Do you know the name of the person who is active in directing the Tri-Square Program?

A The only name that comes to mind is the man who I believe is the Treasurer, who deals with my office all the time.

Q What is his name?

A Mr. Joseph Seligman.

(Whereupon, a Fee Schedule for the camp, 1963 through 1975, was produced and marked for identification as Synod's Exhibit No. 11.)

BY MR. DITTMANN:

Q Now, Pastor, I show you Synod's Exhibit No. 11 and * * *

* * * *

[122] Q And I think we can agree that the operation of the three camps that you had was better than most and left something to be desired in some respects, isn't that true?

A There is always room to grow, yes.

Q Sure. You might have wanted to have larger, a swimming pool for example rather than have the kids in the river, but still like to have the river for boating activities and things like that, isn't that . . .

A No, I wouldn't agree to that. They can swim in a chlorine pool anytime.

Q But anyway, we can fairly say that the operation went on in many ways similar to the programs operated by other camps, better than most and not as good as some?

A Generally, yes.

Q Okay, now, from your experience as Director and other experiences that you might have in the camping field, would it be fair to say that as of the date June, 1970, considering the physical facilities that existed at the three camps and considering the, you know, the improvements as well as the terrain of the property, that this would be a good camp, a good campsite?

A Yes.

Q Is that true?

And it would be a desirable site to somebody who might be in the market for buying a camp, isn't that so, assuming [123] that it was for sale, you know, available?

A There are so many variants in something like that, Mr. Ruvolo. There are things I would like to have seen changed that we would have changed if we were staying. Again, I would have to say, generally, yes.

Q In other words, generally yes, it would be marketable if it were for sale and there was no question of the act coming in or property being taken; if a camp buyer came along and looked at that site, he would say, "Well, it is a good site for a camp"?

A If there were a camp buyer, I suppose he would, or she.

Q Now, the big difference, I think we can agree between your type of camp, when I say that, I mean a religious organization-type camp, whether it be the Lutheran or C.Y.O. or Jewish camp, would be in the goals, isn't that true, or would the goals be similar?

A I would think that the goals would be similar. When you mention C.Y.O. and Jewish camps and Protestant camps . . .

Q Let's narrow it down to just religious oriented camps, the goals would be similar, isn't that so?

A On the basis, for instance of the 15-camp evaluation that we did in about 1972, there are a variety of goals and a variety of sites and programs. There is tremendous diversity, just in those, say, Protestant camps, so it is hard [124] to say, yes, we would all agree or yes, we would all do things generally the same way. It would be very difficult.

Q When I say goals, I mean the purpose of running a facility such as this is in building the character, the moral training and possibly improve on their religious education on the children that attend those camps, those children belonging to that faith?

A Generally, yes.

Q Now that distinguishes those kinds of camps from, say, the Boy Scouts or the Girl Scouts or that type of organization camp. They do not have religious programs that your camp would have, for instance, isn't that true?

A Generally, yes.

Q And I think you testified yesterday, for example, that there was a morning session for religious classes to be given and then devotions would be in the evening at the end of the day?

A No, at Miller-Hagan they, I believe they had a total of three hours in two weeks of what they call the religion class. It wasn't a daily event. There was, at the end of the day, there were cabin devotions and at Ministerium, at the beginning of the day, there was a brief devotional period, a quiet time, introspective time.

Q There is a chapel on the camp?

A The camps each have a chapel.

[125] Q Now, that is a major distinction from the Boy Scouts and Girl Scouts and that type of thing, isn't that true?

A I doubt it, I imagine many of them would have chapels.

Q Do they have required religious programs for the children at these camps?

A I am not that familiar. I would doubt it, but I am not familiar enough to say yes or no.

Q Now, there are other types of camps as well. For example, you read in the paper almost every Sunday, football camps run by Joe Namath and Terry Bradshaw, basketball camps. Now, these camps have become very popular in the last few years, have they not?

A For a certain group of people, yes.

Q And have you any knowledge or are you aware of the fact that in the particular area, the Pocono area, that quite a few of them have sprung up over the past few years?

A I know there is a Pocono Sports Camp on Route 209.

Q Right. And those kinds of camps, their major goal is to concentrate on that major sporting activity?

A Develop a particular skill, I believe.

Q Develop a skill.

But they also have swimming, generally; they have other fields for recreation and sometimes arts and crafts?

A I can't say, I have never visited them.

[126] Q I think you mentioned yesterday that you did have a personal experience with Camp William Penn, is that correct?

A Yes, I spent a day at Camp William Penn in about 1972, '73, I believe it was.

Q And your counsel asked you, I believe, to compare the William Penn camp with the operation that you had going on at the time and I think you said that the major difference was the difference in goals?

A Yes, my impression was that this was the case.

Q Would you explain to us what you felt to be the goal of the William Penn Camp?

A Well, William Penn camps first were limited to the disadvantaged. They were, the campers were sent by various playground organizations in the city, designated playground catchment areas, whereas of course, we were open to the advantaged as well as the disadvantaged.

They didn't have the variety of programs that we offer.

Q Such as?

A Well, such as boating and canoeing. They had no boating and canoeing.

They didn't have the overnight backpacking kinds of experience that we have. They didn't have the maturity of counsellors.

Q Just limit it at this point to goals. What was the [127] goal of that William Penn camp as you saw it?

A As I saw it, the goal of William Penn camp was to get disadvantaged campers out of the city for a couple of weeks.

Q And put them in a different environment and hope by doing that, to possibly break them from some of the habits of living in the ghetto areas, eventually?

A Give them the taste of an alternative, I would think.

Q Now, how does that differ from the goal that you felt was in existence as regards these three camps?

A Well, we worked much harder in terms of program development. Anybody can get people out of the city for a couple of weeks. We wanted to make good use of those couple of weeks with a very carefully developed program.

Our main thrust at both of our camps is to help youngsters understand the inner actions of living together so that you have youngsters on an overnight, we think this kind of thing is very important because it is on an overnight, for instance, that you can begin to work with the variety of dynamics within the group. It is the pressures of an overnight that get youngsters to have to work together. If it is ten o'clock at night and they haven't collected the wood for the fire, they are getting pretty hungry.

We are using many of these things as a means and what we are after is the dynamics of living together and how [128] that can be improved.

Q I was interested in what you said yesterday that you considered this to be a laboratory for the, I think it was the theology or the, I don't know the exact quote at the moment. Do you recall what that statement was, a laboratory?

A For church schools.

Q For church schools, right.

In other words, you were trying, you felt that this was a good place for them to get some of the good foundations of the church and the teachings of the church that would normally take place in a church school?

A No, no.

Q What did you mean by that statement?

A Perhaps I can help with an example.

A few years ago, I had a call from a woman saying she would like to place her son in the camps and proceeded, you know, to explain the different programs so she could choose and what developed in the conversation was that she was feeling guilty. It was a mixed marriage and her son had not attended church or church school and he was getting close to what we consider confirmation age, junior high, and so that she asked if maybe two weeks or four weeks in a camp might give him some Christian education and I said, "We can't replace church school, you know; don't ask us to do what you haven't done in twelve or fourteen years."

[129] And the reason I use this as an example is that in church school or in classroom situations, whether it be in the context of religious education or general education, there are so many things that you can't learn sitting in a chair around a table, especially youngsters. At times, I have taught church school confirmation class and when you want to move towards a point, you have to say to them, "Do you remember some time when you were mad," and they were sitting in ties and suits and they are on their good behavior for an hour and they are not listening, you know, but at least, possibly they will get the content. They will get the foundations in that context. At camp, we can talk to them when they are mad, you see, and they are having the feelings at that time. They never slept with a black in the same room, with a black before. Now, when they were in their suburban home, this really wasn't a problem for them, but in the context of camp, it became a problem.

So, this is what I mean by a laboratory. We had the feelings, the living situations from which we could then help them to understand what had been talked about in church school or had been talked about in classes, where the nature department; as I said yesterday, you can look at all the pictures you want to about a frog, but until you sit down and cut one up, you are not going to know where the intestines are, you are just not.

[130] Q In your opinion, which is the most of the two, and they are both important. Let's understand that, but which is the most important aspect of these three camps; what you are just talking about, the getting to know nature, the enjoyment, love and gospel and brotherhood or is it the physical part of the program; the swimming instruction, the fishing instruction, the boating instruction, that type; which would you feel is the purpose of your camps, the most important, you know, priority?

A I don't think either would work without the other. It is like saying which is more important, the first floor or the second floor.

Q Well, they do work in other camps.

A I can't speak for other camps.

Q Or one does not exist in the other camps.

A But I can't speak for other camps and you are asking me what I think is most important. I think they are both important. You can't separate them.

Q You can't separate them.

Now, William Penn, you said that is a camp for underprivileged children. Do those children pay any fees to go to that camp?

A I don't know, I am not sure. I would doubt it, but I am not sure.

Q And you mentioned Wyomissing. That was a Big * * *

* * * *

[138] Q Now, when you got to the religious distribution of campers, were those children included in your computation?

A Those children are included. The registration form has a spot to list religious denomination so that if they were Lutheran, they would have been counted as Lutheran. If they were not, you know, they would be listed as non-Lutheran, but that is right on the registration form.

Q By the way, would you have a copy of the registration form or application?

A Golly, I may have one in my briefcase left over from this last season.

Q Well, when you get your other records, would you see?

A I will look, yes. I could have one sent down.

Q Fine, appreciate it.

Now, according to your testimony regarding Exhibit No. 9, Synod's Exhibit No. 9, in 1965, the percent of Lutheran as against non-Lutheran was 59 percent Lutheran, 41 percent non-Lutheran, correct?

A Yes.

Q In 1966, it went up to 60 percent Lutheran, 40 percent non-Lutheran?

A Yes.

Q In 1967, it went up to 62 percent Lutheran, 38 percent non-Lutheran?

[139] A Yes.

Q In 1968, it went up to 64 percent Lutheran, 36 percent non-Lutheran, correct?

A Yes.

Q In 1969, it went up, down a little bit to 61 percent Lutheran to 39 percent non-Lutheran?

A Yes.

Q In 1970, by coincidence, that was the year that you became Executive Director?

A Yes.

Q Correct?

And it was also the year that the government acquired the property, correct?

A Yes.

Q And that year, the figures changed the other way; 43 percent Lutheran, to 57 percent non-Lutheran, correct?

A Yes.

Q Would you explain why the big change?

A I think it is right on the exhibit, sir, at the top.

Q That being on top, it says that you reflect only Miller and Hagan, isn't that correct?

A There were no non-Lutherans, non-Lutheran records before I came on the scene for Camp Ministerium.

Q Oh, I see.

A And when I came on, I said I wanted to know what the [140] whole breakdown was and so in my year end report, I received the breakdown. The other years don't reflect Ministerium; that is what it says at the top of the exhibit.

Q I see, okay.

Now, Ministerium was a little bit different from the other two camps, was it not? When I say different, I mean, not only physical in size and that kind of thing; I mean in operation of the camp.

A Programmatically, yes.

Q Programmatically. Miller was for girls, I believe?

A Boys.

Q And Hagan was for girls?

A Um-hum.

Q And Ministerium was?

A Co-ed.

Q Were they older campers?

A Miller and Hagan campers could start at age eight and go to age sixteen, but Ministerium, it was age nine to sixteen.

Q Now, we are talking about 1970, correct?

A Yes.

Q And prior thereto as far as you know from your own knowledge?

A (Witness, nodding head.)

Q So that, the program would differ because the age [141] was different with the children?

A Well, the program differed because it was a differently oriented program. It didn't have much to do with the age of the children.

Q What was the difference in the program?

A In Miller and Hagan, programs, are structured, scheduled programs with a large emphasis on the skills. As I mentioned yesterday, the various Red Cross, the aquatics and the nature, the various departments; Ministerium is as I said yesterday, a small group camp which means that we try to bring together people from very different backgrounds and in the pressure cooker of having to live and work together, help them to break through the various barriers that people have towards people who aren't like them. So that it was more of a socialization kind of camp experience than it was a, let's teach them Red Cross life saving.

Q With more of, say, the disadvantaged children being sent to Ministerium because of this type program rather than the other two camps?

A No, I think the opposite is true. The reason I think for that is that Ministerium is a more verbal program and disadvantaged youngsters often are disadvantaged verbally but they are not necessarily disadvantaged in terms of athletics and physical skills and so generally, we find that disadvantaged youngsters are better for the first couple of [142] years in the Miller-Hagan program until they become comfortable in the climate.

Q Could you give us an idea of say in 1970, how many of the disadvantaged children, if any, would have gone to Ministerium?

A Now, again, I would have that record in the motel room, I am sure.

Q You have that record.

Now, was Ministerium also at one time, I am not sure of the date, wasn't that used as a family retreat center as well?

A We were experimenting for a few years because we were most anxious to get into family camping and to work with whole families. We were experimenting, with using the campsite for family camping. It was not built for family camping and it didn't lend itself comfortably. I believe as I mentioned yesterday, our design was to have established family camping facilities across the road from the existing camp, if we were staying and because we just weren't satisfied with the product, we decided to end family camping until we were able to move and do it right.

Q Okay, now, when did you start the family camping type operation and when did you discontinue it as far as these three camps are concerned?

A To my knowledge, family camping was discontinued * * *

* * * *

[158] THE COURT: No, I think it is relevant. Overruled.

A Generally, not specifically.

BY MR. DITTMANN:

Q And by private camps, I mean camps that are operated for a profit. How are they usually referred to, in the camping business?

A Private, independent camps.

Q Private, independent camps.

Now, directing your attention to Synod's Exhibit No. 11, which I believe is before you?

A Yes.

Q And that exhibit relates to fees paid by campers?

A Yes.

Q Would you tell us, and focusing on the year 1970, the weekly fee paid by Lutherans was what?

A $45.

Q And the weekly fee paid by the non-Lutherans was how much?

A $47.

Q Are you in a position to compare that weekly fee with the weekly fee charged by private, independent camps at that time?

A Generally.

Q What would be the approximate fee per week charged by a private, independent camp be as of that date?

[159] A Camps comparable to our program, generally on a seasonal basis would be $800 to $1,000 to $1100 for eight weeks.

Q And dividing those figures by eight, you would get what?

A Something over $100 a week. We estimate that our costs run at least $18 to $20 a week more than what we charge consistently, per week.

Q Are you familiar, you have met the parents of many of the children who have been involved as campers over the years?

A Yes.

Q Have you visited them in their homes?

A Occasionally.

Q We have been discussing underprivileged children and I would ask you whether the children and their parents who have been coming to the camps over the years, not classified as underprivileged, ask whether or not they come from families of modest circumstances?

A Generally, I would say yes, because the Lutheran church generally represents a modest income, a middle income people with a smattering of professional and much higher income.

Q Then, do I understand it that the tuition rate charged Lutherans in 1970 and on the other years shown in [160] P. 11 is substantially less than private rates to your knowledge?

A Oh, for comparable camps, considerably, because we don't make a profit.

Q And has it been your experience and observation over the years that these, that the rates that are charged for your camps have enabled a substantial number of children to have a camping experience who otherwise would not have been in a position to do so?

A Yes, especially; now, I can't document this, but I am concerned that generally in life, more and more things are available to the disadvantaged than to the greatly advantaged and less and less things available to the middle income people and it has been one of our concerns that camp be available to youngsters of middle income people and we have struggled to keep the rates down for that purpose. Mr. Ruvolo said you could break even if you charged—

Q Please don't quote Mr. Ruvolo.

A I'm sorry. If we did charge another $10, if somebody has got three children, that's thirty dollars and if they are a middle income family, that can hurt and so we try to keep it at that level.

MR. DITTMANN: That's all.

THE COURT: Anything else?

MR. RUVOLO: Just a couple of questions.

[161] RECROSS EXAMINATION

BY MR. RUVOLO:

Q When you talk about private, rates being quite different from private, independently run camps, I can see that. How about, would the rates compare with Boy Scout camps?

A We are higher, generally higher than Boy Scouts.

Q How about Girl Scout camps?

A Generally the same.

Q Y.M.C.A.?

A Golly, Conrad Weiser in my area of Reading is higher than us.

Q How about C.Y.O., or something like that, another religiously oriented camp?

A I really don't know.

Q Wouldn't know, okay.

And on these children, these parents that, do you get many kinds that are repeaters, I mean, come back year after year?

A Yes.

Q Do you get many kids that come from different states?

A Some, yes.

Q I spoke with a Mr. Lombardy or Lombardo, one of your camp directors?

A Yes.

[162] Q He told me that some of the kids, you tell me if it is accurate, I don't know, he told me that some of the kids come as far away as Florida; their parents bring them up?

A One boy that I know of because we always have to make arrangements to pick him up. It is one of these instances where the father was a Miller camper. It's the traditional thing, wants his son back to grow up where he grew up, yes.

Q How about other than Pennsylvania; we know from New Jersey, I presume you get some from New York?

A Considerably less from New Jersey, but some from New York.

Q Any other states you can think of, surrounding states or otherwise?

A Delaware, Maryland; two boys from Puerto Rico, these are the ones that come into my mind.

MR. RUVOLO: No further questions.

THE COURT: All right, next witness.

MR. DITTMANN: I would like to move for the admission in evidence of the series of photographs marked for identification by the Government and submitted to the jury, i.e., the photographs of Camp Ministerium, I think it is Government's Exhibit series No. 4 to 4-F.

THE COURT: I am going to admit into evidence every exhibit offered by the plaintiff if it has not been received in evidence.

[163] MR. DITTMANN: The Government hasn't offered them so I would like to offer them, the five photos.

THE COURT: Is it all Government's exhibits are now in evidence as well as the Synod's exhibits?

MR. DITTMANN: I think there is one that I objected to, 33, 34.

THE COURT: May I see counsel at side bar.

(Discussion off the record at side bar.)

ROBERT NEUMEYER, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DITTMANN:

Q Pastor Neumeyer, where do you live?

A I now live in Philadelphia.

Q And what is your profession or occupation?

A I am a clergyman and a director of the inner city work for the Lutheran church, Southeastern Pennsylvania Synod.

Q Where are you headquartered?

A Nineteenth and Chestnut is my office. The Synod office is in Germantown.

Q And how long have you served as director of the Center City Parish?

A It will be 11 years this September.

Q Would you tell us, please, what the function and responsibility of the Center City Lutheran Parish is?

[164] A Center City Lutheran Parish is a loose federation of 23 Lutheran churches, all in the inner city and deep ghetto areas of Philadelphia. The purpose is to reach out, primarily to that segment which was, is normally called the underprivileged, the unemployed. It is predominantly black and Spanish with some poor white mixed in, but it is the, racially speaking, it is the black section of Philadelphia. And we try to expand the ministry there in terms of the church and service to the community and so this special organization was developed 11 years ago.

Q And how many churches did you say are included in this parish?

A Twenty-three.

Q And when I refer to the parish in the future, I will be referring to its actual title, I will mean the

Center City Lutheran Parish. By the way, what is your educational background, Pastor?

A Born and raised in Allentown, went to Allentown public schools. From there, to Muhlenberg College and then, the seminary at Philadelphia, Lutheran seminary.

Q You graduated from the seminary when?

A February of 1945, I think.

Q And then after your graduation, what was your pastoral experience?

A Well, I was in the United States Navy for a couple [165] of years as a chaplain in the South Pacific and then from there I went to Williamsport, Pennsylvania, for about five years and then to Wilmington, Delaware, in a congregation, pastor of a congregation and from there to Philadelphia.

Q And you have been in your present position almost 11 years?

A Right.

Q What do the activities of the Center City Parish include?

A Well, of course, each congregation is autonomous in that they can do the things that meet the needs of their particular neighborhood best and my job is to try to coordinate some of those. In other words, if five or six bases need a special kind of thing, then it is my job to work at that. For example, college motivation. Our kids, ten years ago, we had practically none in college. Today, we have about 150 in college and that involves tutors, remedial reading. It involves motivation trips to various college campuses. It involves getting jobs, it involves setting up savings accounts so that the kids are putting money away that they can go. It is that kind of thing. We are in day care. We have about 500 children in day school in preschool education programs. We do some work in community organization, trying to change neighborhoods. We do some gang work.

Then, there is the normal, what I call the normal [166] things that most congregations do. We do leadership training in terms of evangelism, stewardship, what have you. We run a very large summer, we call it a summer Bible camp which is not, which is different from the residential camping that we are talking about here.

We had 2,700 involved in that program with a staff of nearly 200, all of which are now indigenous leaders. Ten years ago when we started, we had no leadership at all for the summer programs from our own churches. College kids came in to work with us. Now, we have our own. So it is that widespread of a variety of programs.

Q Well now, this case pertains to the camping program of the Synod.

A Right.

Q Along the Delaware River?

A Right.

Q And you are familiar with the three camps that are involved?

A Right.

Q In fact, you have been sitting here in the courtroom this morning, have you not?

A Yes.

Q And would you tell us, would you direct your attention now to your parish activities that deal with summer residential camping program?

A Yes. Well, some years ago, we felt that we had to [167] do something to try to get our kids the benefits of a good residential camping program. Prior to that time, they had gone to some camps that the city or model cities or the anti-poverty program had run and you may have, there were some headlines about investigations of some of those camps. One particularly that was run in Delaware, which the conditions were horrible, the leadership was bad and we said, "We are going to make every effort to get our kids into a quality camp." So, we looked at our Synod's camps and said, "That's where we want to go." So, it was my job then to try to raise the money to help kids to go and to negotiate with the camp to see if we could get some special rates. So that, this past year, we had, let's see. We managed to get 287 camp weeks at Miller, Hagan and Ministerium and 121 weeks at Central Pennsylvania Synod Lutheran camps and the funding of that is a joint funding. The parents, every family must pay something. No child goes for nothing unless it is an extreme emergency but we don't like the hand-out systems so every family must pay something. The Synod raises campership money and I write proposals to foundations, trying to get assistance and then, of course, there is the discount that comes from the Camp Corporation but our reasoning for going beyond is because the way the segregating housing patterns are now in Philadelphia, our kids can literally go through school without knowing any white kids at all and the hassle [168] that is going on in the schools and the busing and all that, we feel has to have some positive approach and camping for us is. It is the time when our black kids can get to know white kids in an excellent setting and when the white children, who come from other sections of the Synod and very rarely have communication with black kids can do that and we feel that a racial aspect, it is very important and foundation money has frequently come to us because of it.

Q May I interrupt. Pastor, when did you first start sending these children to the Synod, the three Synod camps in Delaware River?

A Well, there have always been some children who went on their own. Obviously, not all black people are poor people and there were some of moderate means who could afford to do it.

We began, let's see. I guess it would have been, I know that when I came in 1964, there were some children who were there but it has been particularly in the past five years that there has been a big effort and where we are able to get foundation assistance and where the Camp Corporation itself was of great help to us in making it possible. So, there has been an increase. I would guess, well, it certainly has been more than, more than quadrupled in the past six, seven years, the number of children and the number of weeks.

Q How are these children selected, who are sent under [169] your program to the Synod's camps?

A They are selected literally by the congregation or the pastor or some official within that congregation, some worker. All of the kids are not Lutheran, but all of them are attached in some way to a program run by one of our

churches. In other words, if we have, well, say, a tutoring program, that program is not just for kids who are members of the Lutheran church, but it is for them and their friends so that the child has some association with the congregation and he is then recommended, normally by the pastor, but they are not all stamped Lutheran.

Q Well, then, these children indicate their interest in attending the camps?

A Right.

Q And do their families, what portion of the cost of camping is contributed by their families, if you know that figure?

A This year, we tried to get a minimum of $25 or $30 from the family and of course, sometimes the churches themselves, the congregations will engage in some fund raising. One of the congregations is now planning for next year and all of the families who plan, who want to have their kids go to the camp next year will be involved in fund raising activities from now until next June; chicken suppers, bus trips, anything so that the average, the average family this year gave between [170] $25 and $30 towards his, a week at camp.

Q What is your theory for requiring the family to make a contribution towards the cost of camping?

A Well, you know, we are in the middle of a situation where family structures are dissolving. We feel it is one of the big problems in inner city life and so we try to involve mothers and dads as much as we can and also, we feel that when a child has contributed in some way to going, that he will appreciate the experience much more than if you just hand it to him.

THE COURT: I think we better stop here. It is 11:30. We will resume, Members of the Jury, at one o'clock or as soon thereafter as possible. I have a matter at one. It won't take long. I am sorry to do this, but we have such a crowded schedule, I have to just use every available hour.

I want to see counsel in chambers, please.

(Whereupon, the noon recess was taken.)

(Discussion at side bar.)

MR. DITTMANN: It is hereby stipulated between counsel that the cost of constructing functionally equivalent substitute facilities similar to the existing Delaware River camps formerly owned by the Synod substantially exceeds the fair market value of the condemned camps as determined by the conventional approach.

(Whereupon, the discussion at side bar * * *

* * * *

[200] With the Court's permission, can we excuse Mr. Seligman?

THE COURT: You are excused.

MR. DITTMANN: May we take a short recess, now?

(Whereupon, a recess was taken.)

MAURICE BONE, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DITTMANN:

Q Mr. Bone, where do you live?

A In Oreland, Pennsylvania.

Q What is your profession or occupation?

A I am a consultant in camp development in the firm of Bone, Wright & Associates.

Q What is your background in the camping field?

A Well, from 1950 to 1970 I was on the national staff of the Presbyterian church in Philadelphia. My responsibility was camp programs for the first five years and the last fifteen was counsellor for campsite development.

Q What were some of your duties and responsibilities during your period of employment by the Presbyterian church?

A During that time, there were approximately 80 camp properties developed for camping programs throughout the Presbyterian church in the United States and that I had a part in development. At that time, also, I was a member of the [201] Committee of the National Counsel of Churches, responsible for camp programming, preparing materials for leadership and program. At the same time, I was a member of the American Camping Association which is a national organization serving camps and for a period, was on the national board. At that time I was chairman of the Committee of Site Selection and Development for the American Camping Association.

Q What is your educational background, Mr. Bone?

A College degree in agriculture, University of Illinois; seminary degree, Bachelor of Divinity, McCormick Seminary in Chicago.

Q And are you ordained in any church?

A Yes, Presbyterian church, United Presbyterian Church.

Q What is the American Camping Association?

A The American Camping Association is really an association, perhaps a federation would be as good a term as another, bringing together all the major camping groups in America; the private camps, the agencies, the Boy Scouts, Girl Scouts, Y.M.C.A., Camp Fire and Salvation Army, Jewish Welfare camps, Catholic camps, Protestant camps, church; it is broadly representative of the major camping groups in America.

Q Do you know how long the association has been in existence?

A I think it started somewhere in the '30's as an [202] American Camping Association.

Q And you previously said that you were chairman of the Site and Development Committee, is that correct?

A Yes, for a period of time.

Q And what other activities did you engage in on behalf of the American Camping Association?

A We kept getting inquiries from camping groups in America, asking about the future trends and all aspects of camping so we brought about a conversation between representatives of the camping interests and the federal government. I was on the committee. In fact, was chairman of it for eight years from 1964 to 1972 when these meetings were held nationally involving about fifteen departments of government and including the Corps of

Engineers, Health and Welfare, Forest Service, Soil Conservation Service, Parks Service and so on and representing all of the camping interests, the groups that I just mentioned.

Q What were some of the topics considered in these meetings between governmental officials and the camping association?

A We were concerned about policies, how policies are formed, the relationship between the federal establishment, the public and the private sector. We were concerned about establishing relations between the public and the private sector.

[203] For example, the Girl Scouts discovered that the outdoor recreation was concerned about setting apart some natural, restoring some trails, and so they volunteered to help with that.

The Forest Service was developing some guidelines for the development of the camping facilities in the Forest Service. They, therefore, knowing us, brought together a group of eighteen of us, representing eighteen different camping groups to help them develop the policy for all four service camps.

Q You earlier said that you were associated with Bone, Wright & Associates?

A Yes.

Q How long have you been associated with that firm?

A Since 1970.

Q And what is that business of that firm?

A Our business is to provide continuing consulting service to camping groups whenever we are invited.

In 1970, when I retired from the Presbyterian Board of Christian Education, I was not replaced and neither were my counterparts in several other denominations. The only denominations now which have national assisance for camping programs are the Lutheran church in America and the United Methodist church. So we provide consulting service in all aspects of camping from planning to operations for church and [204] agencies throughout the nation. We have done a great many evaluations in about twenty states, but we start from the idea to the operation, the total thing.

Q Would you give us an idea of some of the states and some of the projects in which you have made studies in the last five years?

A Northern California, we started there thirty-five camps; Oregon, Washington, about twenty in one and twenty-eight in the other.

Q Who is the sponsoring agency?

A Those were inter-denominational, ecumenical groups. We studied the Baptist camps in Iowa and Minnesota, the Methodist camps in Colorado, Utah and Idaho, the ecumenical group in the State of Virginia, the Presbyterian camps in North Carolina and in South Carolina and Georgia. I was with Pastor Gulliford in 1972 when we made the studies here in eastern Pennsylvania. We also made a similar one in central Pennsylvania and in western Pennsylvania.

Q Now, directing your attention to the studies you made in eastern Pennsylvania, at whose request was that study made?

A It was made by an inter-denominational group, ecumenical group, including the Presbyterians, Methodists, Lutherans, Episcopalians, Baptists, United Church of Christ, Disciples, Moravian.

* * * *

[211] suitable campsites along that section of the Delaware River south of Shawnee to Philadelphia?

A Just my observation as I have driven up and down the river.

Q What is your observation?

A Observation is that suitable sites would be hard to find. Also, in view of the escalating land prices, particularly of water front property.

Q Why would a suitable site be hard to find on the Delaware River?

A Well, my observation, it is held either by private groups who like it there and who don't want to give it up or by industry or by groups who have purchased it for that very reason, knowing that this is highly desirable land.

MR. DITTMANN: Cross examine.

CROSS EXAMINATION

BY MR. RUVOLO:

Q Mr. Bone, I have some figures here. I just want to know whether you would agree with me.

In connection with the decline of camps, my information is, and I am talking about the registered camps in Pennsylvania, in the State of Pennsylvania, that in 1970 there were some 827 and that there has been a decline in 1974, in 1975 to about 772. Do those figures kind of match up with your recollection; I mean, with your opinion?

[212] A I don't have any idea of the number. I just know that they have been steadily declining.

Q And other information may be, you know, Monroe County, my information is they have gone from 45 to about 39 over that same period of time.

A That could very well be.

Q Would that fit in generally with what has been happening, there has been a decline? We were just talking about water and you said, I think, that since 1969, '65 or '70, the statistics have shown that the number one interest is water.

Now, when they talk about water, that could be water along the river?

A (Witness, nodding head.)

Q It could also be lake?

A Yes, lake, recreational water.

Q Good ponds on the property?

And we know that these three camps are situated right along the Delaware River.

A Right.

Q You said you were up to Bear Creek property, which has been purchased. Is there any water on that?

A A stream, at present.

Q Right; now you are an expert. If you were going out to look for water property, water oriented property, would the * * *

* * * *

[256] properties, that they had their highest and best use for camping purposes.

Q Would you tell us why?

A Yes, in the first place, they were all extensively improved for camp purposes. Miller and Hagan, more so than Ministerium but they were all designed and used for camping purposes.

The buildings were in generally good condition. They had little adaptibility for any other use, other than for camping purposes. There was a demand for camping purposes in the area and I felt that the highest and best use, the most practical use of the site was for continued use in their present form.

Q Now, you said that there was a demand for campsites in the area. Were there other or are you familiar with other campsites or camping operations and say, in Monroe County?

A Yes, in 1970, there were approximately 45 other camps within the county alone. There are about 800 in Pennslyvania as total, but of those, about 45 were in Monroe County.

Q And could you tell us approximately how many of these 45 you had the opportunity to examine or visit or something of that nature or become familiar with them?

A I would say over the years, I might have seen half of them or about 20 of them, altogether.

Q Now, generally speaking, how did these camps compare * * *

* * * *

[262] Q Would you explain what the phrase in that definition of allowing for a reasonable time means?

A Yes, this can vary materially. For instance, maybe many of you have been involved in the, either purchase or sale of your own home.

In the last 15 or 20 years, we have been in a very active real estate market and houses as a general rule have turned at a fairly rapid rate. When you get into more specialized types of real estate, if you start to think of an industrial plant, a steel mill, an iron mine or something of that nature, that is extremely technical, extremely complex. And there is a very limited market for it. Then, it could take a much longer time to sell a property of that kind than it might a house or a typical type residence.

Q What would you feel, assuming that these properties were for sale on June 15, 1970, what would you feel would be a reasonable time for, to allow for a sale of such a property?

A I would thing a property of this kind, it might take six months to a year in order to find a buyer that could use it to its best use and find it adaptable for his purposes.

Q Did you find that there was a market for this type of property?

A Yes, sir.

Q Around June, 1970?

A I did.

[263] Q Would you tell us why or what led you to that conclusion?

A Well, in the process of making our appraisal of these particular properties, one of the main things that we had to do was to go out and investigate the market, find out what activities were going on in the market and find out if these properties were suitable and were adaptable for continued use as a camp and we uncovered a number of sales of camp-type properties that were sold for continued use as a camp or they may have been sold for residential subdivision or some other use, but the majority of them were sold for continued use as a camp.

Q Would it be fair to say that in around 1970 and absent, you know, the acquisition by the government or the project being involved that there would have been a demand for this type of property?

A Yes, sir.

Q On the open market?

A In my opinion, there was, yes, sir.

Q Would the fact that the property was located along the river and with the so-called water front property, would that have increased its demand as a campsite or any other reason?

A Well, if you would compare that advantage to the property that didn't have any water, yes, it could. If you [264] compare it to others that have a lake or other suitable water facilities, I don't think, or at least there wasn't any evidence on the market that it made any substantial difference. I think as was stated previously, one of the major requirements for a camp is a water facility of some kind and we don't send our children to camp with the idea that they are not going to be able to go swimming in the middle of summer and that is one of the primary assets of the camping facilities.

Q Mr. Moore, you have mentioned that there have been some sales at campsites in camping, actual camps that took place?

A Yes, sir.

Q I show you, well, how many sales did you find that took place in and around—

A Oh, in Monroe County alone, I think we made up a list of 11 sales that had occurred. There were others besides those but there were 11.

Q All in Monroe County?

A Yes, sir.

Q And could you tell us the years during which these sales took place?

A Yes, the earliest date would date from 1966. The latest transaction that I have on this particular list is December of 1972.

Q Did you prepare an exhibit showing the location of * * *

* * * *

[325] Q For the purposes of what?

A Establishing fair market value.

Q Did you prepare an appraisal establishing fair market value?

A Yes, I did.

Q So that you found there was fair market value for this property?

A I don't follow your question, whether I found it was a fair market value.

Q You said you prepared an appraisal for the purposes of finding fair market value, correct?

A Yes, sir.

Q As of what date?

A As of June 15, 1970.

MR. DITTMANN: I object to that line of questioning. We didn't develop this. This is not proper cross examination.

MR. RUVOLO: Oh, yes, it is.

THE COURT: Let me see counsel at side bar.

(Discussion off the record at side bar.)

BY MR. RUVOLO:

Q So that as of June 15, 1970, did you find that this property had fair market value?

A Every property has fair market value, yes. This had a fair market value in 1970.

Q And would you give us your definition of fair market [326] value?

A Fair market value would be that amount expressed in monetary terms that can reasonably be anticipated by a willing and informed seller would receive from a similarly willing and informed buyer, provided both parties were fully aware of the uses to which the property can be placed and were under no undue pressure to buy or to sell.

Q So in other words, would it be fair to say that that is the value that the property would bring if it was put up for sale on the open market with neither party being forced into it, either the seller is not forced to sell and the buyer is not forced to buy; that would be the price that the property would bring at that time?

A Yes, sir.

Q Okay, now how does that compare with your statement or your definition of ready market?

A Well, you will notice that my definition did not include the term, ready market. Ready market is a definition of the preponderance of buyers of the number of buyers that are in the market place for that type of property. This is in the sense of selling a property. When you are talking about ready buyers, you are talking about those buyers using again that reference, waiting in the wings to buy this type of property. That is a ready market.

Q In other words, as you said before, buyer in hand?

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[341] MR. RUVOLO: It would be the Government's intention at this time, Your Honor, to renew its motions of yesterday and as well as to ask for additional relief. However, in view of the time situation and the presence of the jury, we would like to just reserve this right for a future time.

THE COURT: There is no objection to that, is there?

MR. DITTMANN: No objection.

THE COURT: I will say at this time, you have renewed your motion of yesterday by reference to it and I will permit you to do that again later and supplement it if you want to with other reasons.

(Whereupon, the discussion at side bar was concluded.)

JOHN LEVKULIC, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DITTMANN:

Q Mr. Levkulic, where do you live, sir?

A I live in Pottsville, Pennsylvania.

Q And where is Pottsville, Pennsylvania?

A I would say, about 50 miles northeast of Harrisburg, 50 miles north of Allentown and about 30 miles southwest of Hazelton.

Q And where is your place of business?

[342] A We have two offices; one in Pottsville and one in Tamaqua, Pennslyvania.

Q And what is our profession or occupation?

A I am a civil engineer. We have a consulting architectural and engineering office.

Q What is the name of your firm?

A The name of our firm is Bennest Corporation with the association of Levkulic and Bensinger as the architectural partnership.

Q Would you keep your voice up a little bit so that the jurors here can all hear you. If you get a little hoarse, your throat gets tired, let me know and we will get you some water.

MR. RUVOLO: May I approach the bench, your Honor, again just for a minute.

THE COURT: Yes.

(Discussion off the record at side bar.)

THE COURT: Members of the Jury, in cases of this kind, there are several methods of evaluation and one of them is a principle known as the substitute facilities doctrine. Another is known as the fair market value and we are now starting testimony with respect to the substitute facilities doctrine and after that testimony is finished, we will ask you to, after the closing speeches and charge of the court, we will ask you to deliberate and reach a * * *

* * * *

[351] A Yes, sir, we were retained to make a design, prepare the cost estimate for a functionally equivalent facility to be constructed at the Bear Creek Lakes as they existed out in the Delaware River sites.

BY MR. DITTMANN:

Q All right, are you familiar with the Bear Creek site?

A Yes, sir, I am.

Q How long have you been acquainted with it?

A As far back as 1964, our firm was retained to perform boundary and topographical surveys in that area and I have been familiar with that site on and off since that time, sir.

Q What about the three Delaware River camps of the Synod? What is your familiarity with those sites?

A My familiarity came in 19— latter part of 1971, and early part of 1972, my personal familiarity. There are people in our firm that had familiarity with the camp earlier than that time, but personally at that time, when we were retained to do this study, we had this commission, we did go up and we measured each and every one of the buildings at the sites and made our own investigations on the sites at that time, starting at that time.

Q Were you able to examine the facilities, the buildings and structures at Camp Miller?

* * * *

[358] so, what were they?

A There were some additional costs involved because of the time of design, happening, occurring in 1972, let's say.

First of all, we had camps that were accredited by the American Camping Association, so therefore, when we reproduced, for instance, a camper's cabin at this site, we had to follow certain regulations that they have in the design of camps. I would say that the American Camping Association affected mainly the campers' cabins only in that they got slightly larger than they have existed in order to get accredited, we had to design with those regulations. Also, our Pennsylvania Department of Environmental Resources have their own bulletins for, and regulations for camp and campgrounds. These dictate the number of toilet fixtures you might have for the number of campers, number of lavatories, showers; things of this nature. We found that their regulations slightly increased the number of water closets, et cetera, lavatories, showers, that we had to have at this camp.

The county enforces a national plumbing code up there and there again, in order to design with the national plumbing code, we had to double check the Department of Environmental Resources regulations again, the national plumbing code again as they related to the number of water closets, showers, lavatories and this would be the affected [359] area.

The only other additional cost that we found was in the Department of Environmental Resources regulations for kitchen areas. Kitchen area regulations now demand that floors, walls and ceilings be of a highly impervious-type of material.

THE COURT: Would you repeat that? I didn't quite get that.

A I am sorry. The Pennsylvania Department of Environmental Resources has a regulation dealing with the design of kitchen facilities now presently requires a hard durable surface on all floors, walls and ceilings and this added somewhat to the cost of the kitchen areas in the new camp facilities.

Q Did these requirements that you have just described apply to the facility at the three river camps?

A In my estimation, no, sir. The camps were existing before possibly, before these regulations came into effect and therefore, they were allowed to exist under those regulations to the best of my knowledge, to the time that they were, well, I know some of the camps were torn down.

Q Continuing with the additional costs that were involved here, what was, what access problems, if any, were there?

A Well, we had an access problem only because that, to get to this particular location, we had to come through, * * *

* * * *

[408] Bear Creek site.

Q And Exhibit A lists these facilities item by item, does it not?

A Yes, sir, on the first page of two pages, we have "A-1", "A-2", up to "A-14". Each one of those item numbers is for a particular building or particular building such as a dining/recreation facility or a campers' cabin, pump house, staff cabin, classroom building; this type of thing. Now, for each one of those items, we also have estimated cost of construction.

Q And those items in turn are referred to on the site plan previously marked as Synod's Exhibit No. 14-A-1, isn't that correct?

A That is correct, sir.

Q So, just to further illustrate your point, the first item appearing on Exhibit A is what?

A Dining and the recreation hall.

Q And what is the unit cost of that facility?

A We estimated it at, and now this is as of 1970 cost, $111,274.

Q Incidentally, as far as all of your, as this exhibit is concerned, all of the cost data is as of what date?

A June, 1970.

Q Would you explain again to the jury how you arrived at the unit cost figure of $111,274 for the dining and * * *

* * * *

[422] Exhibit E. What does Exhibit E cover?

A Exhibit E covers our estimated construction costs for the dam at Bear Creek Lake.

Q And the dam, you have previously described the dam and the lake but perhaps you might mention again the size of the lake?

A The lake formed by the dam is approximately, I believe, 10.4 acres in size, about 1400 feet long and it contains about 3,000 lineal feet of water perimeter.

Q I believe that earlier you pointed out to the jury a cross section of the dam, did you not?

A Yes.

Q That was the slice of bread as I described it?

A Correct, sir.

Q So that, what is the principal cost involved in the construction of the dam as shown by Exhibit E?

A Well, earth work, of course, the body of the dam is composed of a concrete core with a lot of earth surrounding it, so the highest cost involved would be the earth and the concrete involved.

Now, one of the main items of cost was of concrete spillway design on the dam. That spillway is regulated. You have to design as per our Department of Environmental Resources to carry flood stage such as a river flood stage and in so doing, this gets to be quite a large structure so it [423] represents a good healthy part of the total cost.

Q What is the total estimated cost of the substituted water facilities as shown by Exhibit E?

A Total cost on Exhibit E is $658,129.

Q Now, continuing to Exhibit F, what does Exhibit F show?

A Exhibit F shows the estimated cost for constructing three beaches on the designed lake at Bear Creek.

Q And what are the principal cost items that are shown there?

A You will have a beach composed of sand which will be a principal item. You also have some, well, Bituminous base, of course, we like to put it under the sand for a beach construction. You have a floating diving board, lifeguard chairs; things of that nature.

Q What is the total estimated cost of the beach construction as shown by Exhibit F?

A At each beach we estimated $10,200, so for the three of them, $30,600.

Q By the way, did you make any estimate of the cost of replacing the water front facilities as they existed at the old camps?

A Yes, sir, we were requested to go up to the Delaware River, investigate what was existing there to come up with an estimated cost to rebuild those facilities right there.

[424] Q How much would that have involved?

A I don't recall offhand, but I know it was higher than this estimated cost for the replacement at Bear Creek Lake.

Q In other words, the cost of these beaches is substantially less than the replacement cost of the water front at the three Delaware River camps?

A Yes, sir, it is.

Q Now, continuing with Exhibit G, would you tell us briefly what that covers?

A Exhibit G deals with all the roadways designed at the new Bear Creek site. It includes, of course, all the excavation, Bituminous, asphalt covering, the base materials used, the shoulders, guardrail involved, storm sewer pipe that would go under the road to take care of whoever would cross the streams and when you have a storm sewer system, of course, you have head walls, vent sections and the cost of the bridge is also in this estimate. And we also have erosion, sedimentation control plants, that are required by the D.E.R. which we have also added in the estimated cost for that work.

Q By the way, all of these, the three river camps did have frontage on public highways, did they not?

A That is true, sir.

Q And those roads, as you will recall, passed through campsites, the subject through here?

[425] A That is correct, sir.

Q What provision have you made for an access road in this estimate?

A As described on the plans yesterday, we have made provision to get off of Route 115 into this site and we designed a road from Route 115 into the Bear Creek site.

Q Is that, is the cost of that access road included in Exhibit G?

A It is, sir.

Q And what is the approximately distance of the access road, if you know?

A Somewhere, approximately one and a half miles, I don't remember the exact distance, sir.

Q Now, within the campsite area, it has been necessary to make provisions for connecting roads, has it not?

A Yes, sir, it has.

Q Can you give us the approximate distances involved in the interconnections?

A I know it was in a report I made, sir, but I don't recall those numbers offhand.

Q And those, the cost of those connecting interior roadways are included in Exhibit G, is that correct?

A That is correct, sir, all the roadways we have designed are included in the cost estimates of Exhibit G.

Q Now, would you please refer to item 25 of Exhibit G [426] and tell us what that is.

A Item 25 is the bridge, bridge that we went over on the plans, that was necessary as we crossed Bear Creek to get to the other side of the lake to form Camp Miller.

Q What is the estimated cost of the bridge?

A The estimated cost of the bridge is $49,500.

Q Now, what then, sir, is the total estimated cost of the road system as itemized in Exhibit G?

A Our total cost for the Exhibit G is $595,450.

Q Continuing with the water system, which is Exhibit H, I ask you what that is; what is included in the water system?

A Okay, for the three camps, of course, we have to design water systems. The Exhibit H is an itemized cost estimate of all the items that we feel are necessary to produce or to provide this water supply, storage and distribution system at the, for the three sites. It itemizes the amounts of cast iron pipe of various sizes from six inches down to two inches, we have also copper pipe itemized that would take the water from the mains into each of the buildings. We have some drinking fountains, necessary gate valves to control that water. We have three pump houses, three wells with the pump house equipment. We have three water storage tanks. All of this is referred to as the water distribution system.

Q I believe you testified earlier that longer water lines would be required for gravity reasons, is that correct?

[427] A Well, they were required, there were longer lines at this site as compared to the Delaware River site because the Delaware River, for several reasons, the Delaware River sites were three separate, where they had their own private, one individual system for each camp. Here, we tried to combine as much as possible and the fact that the topography made us move further away from the camps for our water storage tanks, we had longer lines to get back into camp, but I don't remember exactly how much this increased the system, the longer length of line, but I know there was definitely additional cost involved.

Q How about the pipe size?

A Pipe sizes I feel on this new camp are somewhat larger; that is, our larger sized pipes only because of the new, let's say, the more up-to-date way of computing the size of pipe for the amount of water going to be required. I think the best way to explain that is that very possibly at the existing camps on the Delaware River, you might have started out with just a few buildings in some of the camps and then they kept on adding on and they kept just adding onto the size of pipes that were there whereas if it would have been designed as a total facility by an engineer in the beginning, I believe he would have started out with some larger pipes, would have allowed for expansion to happen. We didn't allow for anymore expansion to happen at the Bear Creek [428] site than what we have planned for, but when we worked this backwards from how much water was going to be required at each of the facilities for each of the camps using standard engineering procedures, we have sized the pipe sizes what we feel they should be.

Q What, sir, is the total cost of the water system as shown by Exhibit H?

A Our total cost in Exhibit H for the water system is $368,859.

Q Finally, I would refer you to the item out of power lines and ask you whether or not you have made an investigation of that item?

A Yes, sir, to bring power into the site and to distribute it to each of the camp areas defined, it was necessary to bring the primary power supply into the site. Now, this, of course, the power supply is controlled by the Pennsylvania Power and Light Company and it is common in projects of this nature to contact that public utility to arrive at a cost of what they would charge the client to bring their power line into the site. We did that in 1972. We got a price from them and now to come back to the 1970 estimate, we have applied a depreciation-type factor that would give us this $35,000 that you see there.

Q And what is your estimate of the cost of bringing the power line into the site?

[429] A $35,000.

Q And that, now, turning to the final page of Exhibit No. 16; that is a summary, is it not, of the estimated costs to replace the camp buildings and facilities?

A That is correct, sir.

Q That includes each of the exhibits which you have just described and it lists the estimated cost of each of the three items appearing on that exhibit, does it not?

A That is true, sir.

Q And what is the, and that includes Exhibit A to H, inclusive, plus electrical distribution, does it not?

A That is correct, sir.

Q Now, what is the total cost of all of those items which you have previously described?

A The total cost is $4,361,633.

Q That represents the total cost of Camp Ministerium, which is Exhibit A, Camp Miller, which is Exhibit B, Camp Hagan, which is Exhibit C, and the sewage system which is Exhibit D, dam construction, Exhibit E; beach construction, Exhibit F; roadway and bridge, Exhibit G; water system, Exhibit H and the power line or electric distribution which is referred to on the summary as Exhibit I, but I don't find it attached to the exhibit.

A No, there wasn't any estimate for that particular thing, item, sir. There wasn't any separate exhibit, I should [430] say, for that particular item.

Q Total estimated cost of $4,361,633 represents the total estimated cost of constructing replacement facilities that are functionally equivalent to the three river camps as they existed in June of 1970, is that correct?

A That is my professional estimate, sir, yes.

Q Mr. Levkulic, are these estimated costs to which you have just testified conservative in your opinion and if so, what would you base your statement on?

A I think they are conservative because there are some factors that we as engineers did not have at our hand. For instance, we had some subsurface data, core boarings that were done down below our site of the dam that we are hopefully able to interpolate to give us conditions of what the subsurface would look like below our new dam. Knowing these subsurface conditions, of course, aids us in the preparation of our design and our cost estimates because then we know beforehand if we have any unusual conditions with which we have to deal with. We have assumed only the conditions that we found that were known for a site below our design and that, of course, is an unknown. If this dam were to be constructed and we started digging and found something unusual, it could upset that cost estimate.

Q Would it then tend to increase it or decrease it?

A If there are unusual conditions, it would tend to * * *

* * * *

[432] Roy Gulliford, Mr. Tom Feasor, who was a chairman of that and our first meeting was at the offices of Attorney Ober Hess in Philadelphia.

Q You met at the offices of Attorney Ober Hess in Philadelphia?

A That is correct, sir.

Q Mr. Hess is an associate of the same firm as Mr. Dittmann?

A That is correct, sir.

Q And when they retained you, what did they tell you they wanted you to do?

A They told me that they wanted to provide substitute facilities functionally equivalent to those existing on the Delaware River at their Bear Creek campsite, that we were to use our best judgment in preparing designs for contractors to estimate so that they could get an accurate cost of what it would cost to reproduce those facilities. I think generally that sums it up, sir.

Q So that they told you that they wanted you to prepare these plans in conjunction with their Bear Creek site, is that correct?

A At their Bear Creek, for construction at their Bear Creek site, yes, sir.

Q So that you in no way participated in the selection of the site?

* * * *

[518] bid say in January, where there are no permits granted and be expected to stick to the same price, if the permit wasn't approved until seven or eight months later?

A No contractor would, but a contractor at this time in bidding wouldn't know if there is a permit or not, sir.

Q He is assuming that the permits would be granted before construction starts?

A Before construction starts, or in many cases, the contractor is required to obtain permits, but in this case I wouldn't expect them to get all the permits that you mentioned.

Q You would expect to get a few, though, wouldn't you, the sewage treatment plant, for example, pretty expensive operation?

A L and I, and the sewage.

MR. RUVOLO: That's all.

THE COURT: That will be all.

RICHARD SCHAEFER, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DITTMANN:

Q Pastor Schaefer, where do you live?

A Laureldale, Pennsylvania.

Q And where is Laureldale?
A Laureldale is a suburb of Reading.
Q And what is your profession?

* * * *

[520] Q What connection have you had with the Lutheran Synod Camp Program?
A My connection with the camping program began in 1955 when I served as a counselor at the Ministerium Camp in then developing small groupatic camping program. I was counsellor for one year, Assistant Director the next year and director of the program the following year. And then, stayed in that program until approximately somewhere around 1965, 1966.
Q Were you doing that in addition to your pastoral duties?
A Yes, sir.
Q And would you tell us when you first became, what involvements you had with the search for a new campsite?
A 1963, I was appointed to the Site Committee, by the president of the Synod and that was the committee to search out a site to replace our river camps.
Q And who appointed you to that committee?
A Dr. Samuel McKade (phonetic spelling), president of the Eastern Pennsylvania Synod at that time.
Q And who were some of the other members of that committee?
A Pastor Jaxheimer, oh, let's see, Mr. Bishop, Pastor Maynard Hallock and Mr. Parksmith and myself.
Q And you were appointed you say in early 1963, is that [521] correct?
A That is correct.
Q Now, tell us what you did after your appointment to the committee?
A After my appointment to the committee, of course the committee met and we established some criteria for going out to look for a new campsite.
Q What were those criteria?
A The criteria were these; first of all, to find a site where we could transfer the programs of our three camps; secondly, following the guidelines that we received from the American Camping Association, two acres for every camper. We would have to look for something in the area of 1200 acres of land. Thirdly, our concern was to find a site wherein we could maintain the water front programs that were so much a part of the Miller, Hagan camping experiences.

Q What about access ability?
A We agreed that the camps should be located in the Poconos because this is where our present camps had been located and that they should be located in such a way as to be accessible to the entirety of the Synod, which at that time extended from Philadelphia up to Sayre, Pennsylvania, on the northern boundary of the State of Pennsylvania.
Q Now, that Synod was subsequently divided into two Synods?
[522] A That is correct.
Q And the southern Synod is now the Southeastern Synod and the northerly segment is now the Northeastern Synod, is that correct?
A That is correct.
Q That division as I recall occurred in what time?
A I believe it was in 1968.
Q Did you give any consideration to locating facilities for, separately for each of the three camps?
A We had talked about this. And recognizing that administratively, we always have operated at one camping program, we felt that we would look but that it was of primary concern to be able to bring all of our sites together into one area.
Q Where did you look?
A Where did we look? Over the Poconos, I can remember; let's see, that we, when I say we, one of the times I know it was the executive director and I went up to the Delaware River north to the Dingmans Ferry area of the river and looked at two sites up there. We looked south of our campsites, into an area called Cherry Valley at a site. We also looked at a site near Kresgeville, one near Reeders, one which is on the Lehigh River off of Route 115. Those are the ones I can recall at this point.

Q And did the sites that you mentioned, any of these [523] sites satisfy your criteria?

A No, they did not. They did not, generally because of the size of the campsite. The acreage was not there. And their locations were scattered. We couldn't bring, you know, the three sites together. They were scattered all over the Poconos.

Some of the sites, the water problem was there. There were lakes, yes. But the lakes at the time we saw them were polluted. They had little streams running in. They were not lakes that could keep cleaning themselves and would have created what we thought would be serious problems. Many of these sites, the buildings were not adequate for the type of program that we carry on in our camps.

Q Did you have a professional acting as a consultant? Did you get any expert help in the search?

A Yes, we had a professional consultant, a real estate man who was the consultant for real estate of the Eastern Pennsylvania Synod at that time, Mr. Harold Snyder. And it was through his office that we made known that we were looking for camps and also through his office, many times we received information concerning campsites.

Q You mentioned Dingmans Ferry, you looked up at Dingmans Ferry. Is that along the Delaware River?

A Yes, it is.

Q Is that, how far up the river from the three camps [524] is Dingmans Ferry?

A Well, I can't remember in mileage. It was maybe, would a half hour be about right? I don't know, I think that would seem to be about . . .

Q Was the Dingmans Ferry area within the Tocks Island Project area?

A The river part of it, yes. We were just up the hill to the west of the river.

Q On these, the Dingmans Ferry sites were not river frontage?

A They were not river frontage, no.

Q By the way, was there anything available along the river, north of Shawnee?

A No, there wouldn't have been anything north of Shawnee because the Tocks Island Project itself went all the way up to Port Jervis which was the border city between New York and Pennsylvania, the states.

Q When you were appointed to the committee in 1963, were you aware of the Tocks Island Project?

A Yes, we were. Yes, we were.

Q Well, tell us then, sir, how you found the Bear Creek site?

A We looked at these other sites and then received information from a real estate firm in Pottstown that they had a site they would want to show to us.

[525] Q So you went, what happened?

A We went then to look at this site. It was located on the Bear Creek, immediately north of the Bear Creek community. It was 1200 acres. And when we saw it, we were much pleased with what we saw and felt that the size certainly showed some possibility.

Q Pastor Schaefer, I am going to show you a map which has been previously marked as Synod's Exhibit No. 6 and ask you if you would step down from the stand there and point out the 1200 acres which first came to your attention.

(Whereupon, the witness assumed the position at the exhibit.)

A The 1200 acres that came to our attention were the acreage, were to the west of Bear Creek.

BY MR. DITTMANN:

Q And point out to the jury again where Bear Creek runs.

A This is Bear Creek running up there, here.

Q Running up and down?

A Yes, it goes up like this (indicating).

Q So after you found this 1200-acre tract, what was your next step?

A Well, there were, about half the committee saw it the first time. Second, we then asked the rest of the committee to go up and take a look at the site, after they had remet as [526] a committee to discuss the possibilities of this site. While we were talking about all of this we became very much concerned about the control of the water of Bear Creek itself, because we felt that with the type of program we had, it was necessary for us to have control of both banks of the creek, thus eliminating the possibility of other people having access to that body of water. Our attempt was, of course, we are talking in terms of the lake, the lake had originally been there and the dam had been washed out, I think, in one of our hurricanes in the '50's. And that if we wanted to carry on water programs, we had to protect ourselves so that we could maintain a good activity program without the interference of others. So therefore, we then went back to the real estate agents and said, you know, is there anyway that we can get land or the west bank, on the east bank of this creek in order to protect our interest in the camping program.

At that point we were told that yes, there was land available. It was 1500 acres. We said, "Can we have part of it?" No, it was not available in part, it would have to be a total parcel. We felt that this was necessary and therefore decided as a committee that we ought to buy both of these parcels in order to maintain it. As the other issue that enters in, that is the concern for the water shed and the protection of our water. If we would buy this property, we recognized that by controlling both sides we also would control [527] most or all of the water shed and protect and maintain a good water. To the north of us, in this section up here, were state game lands and you well realized that there would be natural protection to keep pure water.

Q How was the price for this Bear Creek site?

A The price was good, it was under $100 an acre.

Q How did that compare with some of the other properties that you looked at in your search?

A The price that was considerably lower, in terms of acreage.

Q That is the price per acre?

A Per acre, yes.

Q Were there any improvements on this site to speak of?

A There was what I chose to call a lodge located in this area. There was a cabin on the other side of the creek that was run down and I think there was a garage to the lodge.

Q How did this lodge or how did this tract in terms of improvements compare with some of the other tracts that you had previously looked at?

A Well, this tract offered us the opportunity of being able to bring in improvements that would be in keeping with our camping program whereas as we looked at other campsites, our problem always was you know, the buildings existing facilities, which are not adequate to what we had as a program.

* * * *

[577] Q Have you at my request reviewed the minutes of the executive board since its action in 1968, to determine whether there had been any further action taken by the executive board or by the convention?

A Yes.

Q To modify, rescind, repeal or change that 1968 action?

A I did review the record and no action has been taken to, in any way, to change that 1968 action. Every year since then there has been an update of what has been happening in terms of our relationship to this condemnation proceeding, but the master plan and that action taken in 1968 has never been altered, changed or rescinded.

Q Now, Dr. Janson, if the Synod is awarded the cost of constructing substitute facilities in this lawsuit, how would those proceeds be used by the Synod?

A Yes, all the proceeds would go into the development of the facility at Bear Creek; principally, in the relocation of the three camps. That would certainly be the primary focus. So all of it would be utilized at Bear Creek.

Q And you indicated the focus would be on the three camps?

A Right.

Q You said earlier that the first priority would be in relocation of the three camps, is that right?

[578] A Three camps, right.

Q Now, Dr. Janson, if the Synod was only awarded the fair market value of the property, based on the information that you have learned of the fair market value figures, what effect would this have on the future camping program of the Synod at Bear Creek?

A It would be a very severe blow. I mean, we have the $450,000 mortgage at this point that is facing us. And if the fair market value figure remains at what it is, it would just seem to me to be an impossible situation for us to face in terms of remaining in camping because we have, I think, a significant investment in the site at this point and it would be just about a wipeout as I see it.

MR. DITTMANN: Cross examine.

CROSS EXAMINATION

BY MR. RUVOLO:

Q Good morning.

A Good morning.

Q Back in 1964 is when the Synod purchased the property at Bear Creek, correct?

A Yes, sir.

Q Does that meet your recollection?

A Yes, sir, that is my recollection.

Q And at that time, they bought 3,000, approximately 3,800 acres and I think the price that we have heard is about * * *

* * * *

[682] Q Is there any dates to your knowledge, when any three of these camps were on the market and available for purchase at the same time?

A Not that I know for certain.

Q Then, are you telling me that there is no, since there was no one date on which any of these three camps that you have referred to were available for purchase, there was no ready market available for the Synod, except Bear Creek during this period?

A No, sir, I didn't say that.

Q Now, what did you say?

A I said that these are possible substitute facilities for a functionally equivalent camp.

Q That could have been picked up one by one during the period?

A That is correct. That was one method of doing it. The other would be the combination that we also pointed out. You could have made one acquisition to accommodate two of the camps and the third one could have been made independently.

Q Incidentally, directing your attention to the double combination, I think your first choice, your first suggestion there, which is that right here (indicating)?

A Yes, sir.

Q That is camp number nine and camp number one, is that right?

* * * *

[721] is a free camping program because it is not. This is a camping program which the Synod, the two synods sponsored. They charged modest fees. The fees were intended to come close to paying the cost of the services. They never did. Instead, the synods, of course, contributed the extra money that was needed to balance the budget. And this, of course, resulted in a camping program that provided a lot of camping over almost fifty years. I guess, for almost literally ten thousand campers enjoyed this. Even Mr. Moore, some of his children had attended the camp and at the same time, as the evidence showed, children, underprivileged children have been given the opportunity to participate in this program, children with special needs and special problems.

Now, as far as eligibility is concerned, these camps have been available on a first come, first serve basis ever since their inception. They are not restricted to members of the Lutheran church or members of the Lutheran Sunday School or anything like that. They are first come, first served. They take care of age groups roughly between 8 and 16. I think Ministerium takes a slightly older group.

But, now as far as the numbers are concerned, the testimony indicates that approximately 50 percent of the campers were members of the Lutheran church. The other 50 percent were not.

The testimony also indicates that there was a lower [722] fee paid by the Lutherans than non-Lutherans.

However, that didn't increase the percentage, still was, even despite the lower fee charged Lutheran children, there was less than a majority of Lutheran children attending the camps.

The Lutherans, the Synod has no apology, of course, for conducting or sponsoring a camping program, particularly a quality program of this sort. And it was suggested, apparently during the course of the trial that this was merely a church program that was designed to promote the Lutheran church. I think it is quite clear from the witnesses who have testified and what they have said that this is a program of providing camping experience to young people under ideal outdoor conditions. This is the church performing its charitable mission. And, of course, if the children become converted to a particular form of religion, that is up to them, but the fact is that this is a program which is not restricted or limited in anyway, and it is, as I say, over half of the children in recent years have not been Lutheran. So that has no application here. I think the important thing is a substantial segment of the community being served by this kind of a program and that is the test that you should honor, you should apply in this situation; not whether or not this is a one particular religious denomination. The denomination is sponsoring this thing.

I mentioned earlier that in addition to children with special needs have attended the facilities and I think Pastor [723] Gulliford explained some of those categories; the mentally retarded children from the White Haven School have attended. Emotionally disturbed children have attended and as I recall, Pastor Gulliford pointed out that he thought it was very desirable from everybody's point of view to have a mix at the camp, not only of, you know, of normal children, but you work into that kind of a program, a certain number of disturbed children and children with special problems and underprivileged types and that way, everybody benefits by the camping experience, particularly, in the case of the underprivileged children, and the campership program that was described to you. There, I think Pastor Neumeyer brought out very clearly in testifying concerning the inner city program in Philadelphia, that one of the

great advantages and benefits of this particular program from his point of view was that this gave a number of underprivileged children from the center city area in Philadelphia, non-whites, an opportunity to meet and associate with and relate to children from, white children, children from smaller communities. In that way, it promoted greater understanding of the two types of children. He also pointed out, for example, that it gave some of the children a chance to escape the gang influence in the city and so to get a fresh outlook. He was particularly concerned about any possibility of a reduction or cutback in this camping program. If anything, you recall that he testified, he foresaw an increasing need for this [724] kind of program. Now, the children that were sent from the inner city under that program went there under camperships or scholarships as you might call them and that is on the basis of money that Pastor Neumeyer was able to raise. Those children paid part of their way or their sponsors paid part of their way. The fact that, I think experience has indicated in this sort of thing that people would make some contribution to their experience like that, usually get more out of it than if they get a totally free ride and I am sure that was one of the reasons for it. Plus the fact that everybody contributes a part. You can spread the scholarship funds among a larger number of people. As you may recall, approximately 228 children were involved in the campership program during 1975. So that this is a substantial segment, not a large percentage in terms of the total operation, but it is, it is a very successful proportion in terms of the overall objectives of the camping experience.

Then, there is, then you heard Mr. Seligman who is a representative and spokesman for the Tri-Square Organization had an interesting history. Tri-Square once had its camp, its camp was condemned. It was put out of business. It concluded reluctantly that it could use its funds better by providing scholarships to attend this kind of camping program than it could by attempting to go out and construct or replace its facilities. And Tri-Square, as a * * *

* * * *

[743] uniqueness about it, in that it couldn't have been put to any use than what it was being used as.

And the third thing they must prove is a lack of market ability. In other words, that there was no fair market value or that the fair market value would be so inadequate that it couldn't recompense them for what was taken.

Now, assuming they prove all three of those things, they must still prove one more thing. And that is, that there is a reasonable necessity to replace it for the good of the community, public good. And, of course, if you were going to find necessity, you must find implied with that statement is that they were performing a public good. All right, now let's take them one by one.

We know they weren't public. On the question of being not for profit, we concede that they are a religious and charitable organization which was operating on a not-for-monetary profit. No question about it. But, is that the only kind of profit? Think about it. They were putting in operation a camping program which was for the betterment of their religious teachings. Is that not a profit for a religion? Mr. Dittmann said, "And if by chance some kid might be converted . . ." Isn't that what they are there for? Isn't that their mission? So, maybe they were operating not for a monetary profit but maybe for a spiritual profit.

Let's go on to two. Uniqueness; what was so unique [744] about these three camps? There were plenty of other camps just like it. You have heard it through the testimony. There were plenty of other camps that were in the same type of programs and was this site so unique that it couldn't be used for something else? Their own witnesses told us no. Their own testimony tells us no. They were being used as camps in 1970 and now, they are being—and then they were changed to be used as a retreat center. Well, that's different from camps. And Reverend Gulliford told us that in the fall they rented out the property to a football, to a high school football team to use as football camps. That is a different use. It is not the same specific use they had and why couldn't it be used as a resort? After all, what is a resort? It is just a camp for big campers. And how many resorts have you gone to where you see people will live and share, say, a cabin? I mean, different rooms, of course, but units of four here and five here and six there. The same thing could apply here. You might have to make some repairs or alterations and move around, but this wasn't unique.

Point three, they had to prove lack of marketability. Their own witness, Mr. Roberts, said that this property had fair market value and he will probably testify tomorrow or the next day and tell you what that fair market value is. How can you say it has no marketability on one hand and yet on the other hand you say, "Oh, yes, it had a [745] marketability. It could have been sold on the open market." There is a conflict there. So in my opinion and the first three they haven't proved anything that they were required to do.

Now, let's get something straight and let's get it straight from the beginning. We said that this is good property located along the river and we intend to pay for that. We want to pay for that. We want to pay just compensation for that. We are not knocking the camps. Yes, they had good programs. They weren't that different from any others, but they were good programs; no question about it.

Now, as I said to you, they want to, if they prove the first three, there is still one big element they must prove and that is, that it is reasonably necessary for them to continue these camps for the good of the public, for the public welfare, for the community welfare. Well, let's look at what they have shown. Where have they shown community welfare? Where have they tried to intimate there was community welfare but really didn't prove it. All they have shown is that they want to continue to operate for their own welfare, for their own good so that they can continue in business. Well, gee-whiz, if we took somebody's business down the street, he could say the same thing, couldn't he? "You are taking my business, I want to continue to operate. Build me a new business." The law would say, "No, we can't build you a new [746] business. The test is fair market value. You take the money and if you want to continue in business, go operate, go open up a new business." They should be treated no differently here. This is their choice. They were in it for their good, their benefit and that is what the evidence has shown. Think about the children that came in. They came from what community? New York, New Jersey, Pennsylvania; as far away as Florida. What community is receiving the benefit? Most of them were from middle income families or professional people. Is that a community benefit? I don't think so. Most of them were Lutherans. And if you look at the exhibit, through the testimony, by far, until we took the property in 1970, there was a big difference in the percentages. There was a substantial difference in the percentages. There was a substantial difference in being Lutheran; before 1970, and those kids that were accepted after 1970. Fine, this is their business, if they want to take care of their own, fine, admirable. But, where is the community benefit? That is their benefit, not the community's benefit. Religion was taught on the premises. We heard Reverend Gulliford tell us that there was a class in the morning and devotions were held at night. I respect religious freedom as much as anybody, but again, that doesn't show a community need. That shows for their own benefit. As of 1970, which was the year we took the property, out of approximately 3,000 campers, and you can take that by figuring they operate on a eight-week season and they told us they [747] could handle up to 600 campers at one time, that is 4800 campers, but take 3,000. Out of 3,000 campers 92 were testified to as being underprivileged. Is that a benefit to the community? 92 out of 3,000 or more? And those 92 had to pay to get there. Not maybe themselves, but somebody had to pay for them. The camp didn't give away any charity. Every kid had to be sponsored. So, where did they lose? If somebody is paying for the kids to go to camp, they haven't lost. Who is taking any money? I will get to this a little further on, but Reverend Neumeyer, he was given a break because he was dealing with their own children from their own programs in center city or inner city in Philadelphia. What, did they give him a free scholarship? No, they said, "Some of the parents had to pay." All right, if they had to pay, couldn't they give them a scholarship for the difference? No, he had to negotiate with them to get a $7 discount per week. Is that a benefit, a public benefit? I submit not.

And they said, and they led us on to think, "We then went in and we took care of really charitable kids. We took seven kids from White Haven in 1972 or 1973," I think. Seven out of, again, over 3,000. But those kids weren't free. They weren't given a scholarship. They had to pay or somebody had to pay for them. In this case, the state. And they took 22 kids from the Silver Springs Institution, but they were a little trouble, some of the kids got a little tough to handle * * *

* * * *

[786] THE COURT: The objection is overruled.

(Discussion off the record.)

THE COURT: Number six has been amended by the Synod to change "is" and delete it and substitute "may", so the point will read, "The existence or nonexistence of fair market value of the condemned facilities may not in and of itself be determinative of any issue in the case."

(Discussion off the record.)

THE COURT: As I understand the government's answer to Point No. 7, it maintains in its position, which it has held all along that depreciation is a proper deduction. I have ruled otherwise and that is why the record, no evidence has been offered of depreciation; no evidence of depreciation has been offered.

However, the government does not object to this language in view of my ruling.

Is that correct?

MR. RUVOLO: Sobeit.

(Discussion off the record.)

MR. DITTMANN: I request this additional point which would be numbered Point No. 8.

"You may find that the doctrine applies if the facilities were operated on a not-for-profit basis for a religious or charitable purpose and had no ready market."

(Discussion off the record.)

[787] THE COURT: The government requests that to Point No. 8, there be added the following: "and was fulfilling a community need or purpose."

And the Synod does not object.

(Whereupon, the discussion inside Chambers was concluded.)

* * * *

[809] doctrine will apply. If you do not find this to be the case, then the property taken should be treated like that of any other private condemnee."

I will ask you to disregard that and consider my other instruction because the doctrine can apply to something which is not public. But the factors have to be present which I have given you.

Now, we have prepared three questions for you. We call these Special Interrogatories.

Number 1. "Under the principles I have given you, does the doctrine of substitute facilities apply?" Yes or no. Just answer it one way.

Next, "If your answer to Interrogatory Number 1 is yes, please answer Interrogatory Number 2." In other words, if you find that the doctrine does apply, answer Number 2, which is as follows:

"What amount would it cost for substitute facilities?" And then, you write in the amount. The third interrogatory is as follows:

"Answer Interrogatory Number 3 if you have answered Yes to Interrogatory Number 1." Again, if you have found that the doctrine applies. Interrogatory Number 3 is:

"Under the principles I have given you, what date have you found as a reasonable time for the application of the substitute facilities doctrine?" Just write in the date.

* * * *

[811] Special Interrogatory. "Under the principles I have given you, does the doctrine of substitute facilities apply?"

"No."

Signed September 30, 1975, by foreman Henry G. Urick.

Members of the jury, is this your verdict, so say you all?

(Jury, indicating assent.)

THE CLERK: Thank you; please be seated.

MR. DITTMANN: If the Court please, may I ask that the jury be polled?

THE COURT: Yes.

THE CLERK: Juror No. 1, please rise.

Special Interrogatory. Under the principles I have given you, does the doctrine of substitute facilities apply?

HENRY URICK: No.

THE CLERK: Juror No. 2, please rise.

Special Interrogatory. Under the principles I have given you, does the doctrine of substitute facilities apply?

THOMAS SCHOEN: No.

THE CLERK: Juror No. 3, please rise.

Special Interrogatory. Under the principles I have given you, does the doctrine of substitute facilities apply?

MARGARET MCKINSEY: No.

THE CLERK: Juror No. 4, please rise.

Special Interrogatory. Under the principles I have * * *

* * * *

[961] Mr. Moore's appraisal of the tracts in question as arrived at in his cost approach? Mr. Moore's economic obsolescence", and then the question lists the three camps with the tract numbers and blank spaces. It is signed by the foreman; and counsel have agreed that the answer to the question shall be answered by writing in the spaces, the following: "In the Miller Tract, $45,000; in the Ministerium, $52,000; and Hagan, $41,000."

(Whereupon, the jury returned to the Courtroom at 2:20 p.m.)

THE CLERK: Members of the jury, have you agreed upon a verdict?

JUROR NO. 1: We have.

(Whereupon, the verdict was noted by the Court.)

THE CLERK: Members of the jury, please rise.

Hearken unto your verdict in the case of United States District Court for the Middle District of Pennsylvania, United States of America versus 564.54 Acres of Land, More or Less, Situate in Monroe and Pike Counties, Commonwealth of Pennsylvania and the Southeastern Synod of the Lutheran Church in America, Civil No. 70,240, Tract No. 1500, 2122 and 2132.

"We the jury find in favor of the Southeastern Pennsylvania Synod of the Lutheran Church of America and award the following: Tract No. 1500, Camp Miller, $250,000; Tract No. 2122, Camp Ministerium, $300,000; Tract No. 2132, Camp Hagan, $190,000; dated October 3, 1975, signed by foreman, Henry G. Urick.

SUPREME COURT OF THE UNITED STATES

No. 78-488

UNITED STATES, PETITIONER,

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, PENNSYLVANIA, ET AL.

Order Allowing Certiorari. Filed November 27, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 284795 276

Supreme Court, U. S.
FILED
OCT 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-488

UNITED STATES OF AMERICA,
Petitioner

v.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals should have reversed and remanded for a new trial because of (1) confusing and inadequate jury instructions with respect to the application of the substitute facilities doctrine and (2) a misstatement of law made by the Government during its closing argument.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Introduction

This case presents legal questions which are neither significant nor unique. It satisfies none of the standards customarily considered for granting certiorari. Instead, the dispute involves established eminent domain principles which the Court of Appeals correctly and justly applied to the facts before it.

II. This Case Was Resolved by Reliance Upon Well-Settled Eminent Domain Principles

Typically, when the Government takes private property, it indemnifies the condemnee by paying fair market value for it. *United States v. Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961). Compensation so measured normally enables the landowner to purchase an equivalent facility with the amount awarded. *See* Note, *Cost of Substitute Facilities As a Measure of Just Compensation When There Is a Private Condemnee*, 1975 Duke L. J. 1133, 1142 n. 40; Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark*, 62 Iowa L. Rev. 1158, 1164 (1977). In this case, however, the Government took property which could not be replaced in the marketplace at a cost roughly equivalent to its market value. Therefore, the payment of fair market value would not indemnify the condemnee.

Accordingly, the Third Circuit invoked the well-known substitute facilities doctrine under which the case will be retried. Relying upon established eminent domain principles, the court below constructed a rigorous three-part test which the condemnee will have to satisfy before qualifying for this measure of compensation. The condemnee must prove that (1) the condemned facility was operated on a non-profit basis;[1] (2) the owner, exercising reasonable diligence, was unable to purchase a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility; and (3) the facility provided a benefit to the community that was not as fully provided after the facility was taken (Petition at A. 28a).

This holding is rooted in numerous decisions of the Supreme Court. No Supreme Court decision conflicts with this holding,[2] and no Court of Appeals has ever held to the contrary. Applying a long line of eminent domain decisions to the facts presented, the Third Circuit correctly resolved the legal issues of this case.

This Court has always held that indemnification is the goal of the "just compensation" clause. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U. S. 470, 473-74 (1973); *United States v. Reynolds*, 397 U. S. 14, 16 (1970); *United States v. Virginia Electric & Power Co., supra*, 365 U. S. at 633; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 326 (1893). Although fair market value is often the measure of indemnification, the Supreme Court "has been careful not to reduce the concept of 'just compensation' to a formula . . . . [I]t has refused to make a fetish even of market value, since that may not be the best measure of value in some cases." *United States v. Cors*, 337 U. S. 325, 332 (1949). It has also said, in *United States v. Virginia Electric & Power Co., supra*, 365 U. S. at 633, that fair market value is "not an absolute standard nor an exclusive method of valuation." Indeed, the first time this issue was addressed by this Court, "[a] method of compensation by substitution" was endorsed as "the best means of making the parties whole" when it was impossible to value a whole community condemned and flooded by a federal dam project. *Brown v. United States*, 263 U. S. 78, 83 (1923).

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[1] The Government concedes the charitable nature of the camping enterprise (Petition at A. 15a).

[2] In fact, this Court provides the forum least likely to resolve what is essentially a factual dispute. The application of well-settled Fifth Amendment principles to the facts is a task peculiarly within the jury's province.

As the Government concedes, the *Brown* rationale has been applied routinely in a long line of condemnation cases. The Government now seeks to distinguish these cases on the ground that they involved governmental condemnees. As Judge Gibbons recognized on the first appeal of this case, however, the Fifth Amendment provides no basis for distinguishing between private and public condemnees when the federal government appropriates property (Petition at A. 83a).[3]

The Government would also have this Court believe that the substitute facilities measure results in a "windfall" to the condemnee. By applying the cost of substitute facilities measure, the Third Circuit gave the Government

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[3] The Government also argues that the doctrine applies only when the condemnee shoulders "a duty" (Petition at 10) or "an obligation to replace the facilities condemned" (Petition at 13). This "legal necessity" test—if it ever enjoyed any vitality—has long since been laid to rest. *See, e.g., United States v. Des Moines County, Iowa*, 148 F. 2d 448, 449 (8th Cir.), *cert. denied*, 326 U. S. 743 (1945). There is no reason now to resurrect this forgotten doctrine. The very cases cited by the Government reject the rigid "obligation" standard it proposes here. None of the courts in the cases cited—*United States v. Certain Property in the Borough of Manhattan*, 403 F. 2d 800 (2d Cir. 1968); *United States v. Streets, Alleys and Public Ways*, 531 F. 2d 882 (8th Cir. 1976); *United States v. Certain Lands Located in the Townships of Raritan and Woodbridge*, 246 F. 2d 823 (3d Cir. 1957); *State of Washington v. United States*, 214 F. 2d 33 (9th Cir.), *cert. denied*, 348 U. S. 862 (1954)—found the condemnee was under any strict legal duty to replace the condemned facilities. Rather, the courts employed flexible "factual necessity" or "reasonable necessity" standards similar to the one adopted by the Third Circuit.

an alternative[4] which may, in fact, be utilized to *prevent* a windfall.[5] When applicable, the cost of substitute facilities will be awarded even if fair market value is greater. *See United States v. Streets, Alleys and Public Ways, supra*, 531 F. 2d at 885; *United States v. Certain Property in the Borough of Manhattan, supra*, 403 F. 2d at 803. To characterize it as a "windfall" is to inject a factual issue at the appellate stage and misconstrue the function of the doctrine—indemnity.

III. No First Amendment Issue Is Presented

Contrary to the Government's assertions—raised here for the first time in the eight years of this proceeding—the determination of "just compensation" raises no issues under the Establishment Clause of the First Amendment. The only question before the trial court is the determination of "just compensation" required under the Fifth Amendment when the federal government condemns property. The fact that the property was owned by the Southeastern Pennsylvania Synod of the Lutheran Church is immaterial to the resolution of this question. As Judge Gibbons pointed out in the first appeal: "The basic principle underlying the constitutional requirement of 'just compensation' is one of indemnity. The condemnee 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but he is entitled to no more'" (Petition at A. 80a).[6] The Synod has asked only for "just compensation" and not for any "aid" which could result in the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education v. Nyquist,* 413 U. S. 756, 772 (1973), *quoting Walz v. Tax Commission of the City of New York,* 397 U. S. 664, 668 (1970). It seeks merely to be placed in as good a pecuniary position as if its property had not been taken.[7]

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[4] Other compensation approaches enjoy widespread approval. The capitalized earnings approach is often employed for profit-making facilities, *see* 4 *Nichols' Eminent Domain* § 12.32[3][c] (Rev. 3d ed. 1976); Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark*, 62 Iowa L. Rev. 1158, 1165 (1977), and replacement cost less depreciation is used for certain "specialty" properties. *See* 4 *Nichols' Eminent Domain, supra*, § 12.32[3][b].

[5] For example, a new school located on valuable urban property may be relocated and rebuilt in a suburban location at a cost far less than the fair market value of its downtown property. The Third Circuit now gives the option of providing the *lesser* measure of compensation in this situation—the cost of substitute facilities. Such a result is fair to both condemnor and condemnee.

The Government, quoting Judge Stern's concurrence, states that " a governmental inquiry to determine whether an activity engaged in by a church 'benefits the community' is 'obnoxious under our constitutional framework'" (Petition at 19). No further explanation for this objection is given nor any citation of authority provided. It is, therefore, not clear where the Government's point is meant to lead. Surely the Government cannot intend to say that if the community benefit test is objectionable the substitute facilities measure of "just compensation" becomes inapplicable. Such a contention would itself lead to a most direct interference with the free exercise of religion. Otherwise phrased, the Government's proposition would be that when the property of a church is condemned it cannot receive the "just compensation" guaranteed by the Fifth Amendment to all other property owners. It is submitted that such a proposition does not warrant examination upon certiorari.

IV. The Order Appealed From Is Interlocutory

The Third Circuit remanded this case to the District Court for a new trial. Anxious to invoke this Court's jurisdiction, the Solicitor General argues that, despite its interlocutory status, this case merits Supreme Court review. As demonstrated above, however, this case presents neither unusual nor important questions of federal eminent domain law. Therefore, this Court should follow its usual practice of denying review for lack of finality. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. R. Co.,* 389 U. S. 327, 328 (1967).

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[6] The Government asserts that the substitute facilities measure of compensation results in a "windfall" for the condemnee (Petition at 20). It further asserts that this "windfall" will influence future condemnations and so divide the community along religious lines (Petition at 22). As demonstrated above, however, the substitute facilities measure simply indemnifies a condemnee where there is no ready market in which to otherwise measure the appropriate indemnification.

[7] Since this case presents no aid to religion issue, the Government's hypothetical contention (Petition at 21) that the condemnation award might be applied to the training of Lutheran missionaries or other institutional purposes and so requires excessive governmental entanglement in the Synod's operations is irrelevant and inapplicable. Moreover, as Judge Van Dusen noted (Petition at A. 6a), the Synod has purchased a replacement site and undertaken an extensive construction program, and the condemnation award in this case will be applied to that facility.

CONCLUSION

This case does not present a question of eminent domain law meriting Supreme Court review. There is no conflict with the decisions of other Circuits. There is no departure from established legal standards.

Wherefore, it is respectfully submitted that there is no reason to grant the petition and it should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1978

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-488

UNITED STATES OF AMERICA, PETITIONER

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-63a) are reported at 576 F.2d 983. The opinion of the district court denying the motion for a new trial (Pet. App. 64a-75a) is not reported. The opinion of the court of appeals on an earlier interlocutory appeal (Pet. App. 76a-87a) is reported at 506 F.2d 796.

JURISDICTION

The judgment of the court of appeals (Pet. App. 88a-89a) was entered on March 27, 1978. A timely petition for rehearing was denied on May 24, 1978 (Pet. App. 90a-91a). On August 14, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 21, 1978. The petition was filed on that date and was granted on November 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when not-for-profit facilities owned by a church or other private entity are condemned, the proper measure of just compensation under the Fifth Amendment is the fair market value of the facilities taken, rather than the cost of providing substitute facilities.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

A. The initial proceeding

In order to obtain land for the Tocks Island Recreation Project, the United States brought this condemnation proceeding on June 15, 1970, to acquire title to approximately 300 acres of land owned by respondent, the Southeastern Pennsylvania Synod of the Lutheran Church in America (Pet. App. 3a, 78a).[1] The condemned property consisted of three nonadjacent parcels of land along the Delaware River on which respondent operated not-for-profit summer camps for young people (Pet. App. 3a-5a, 78a).

In 1964, anticipating that its camp (as well as other property along the Delaware) would be acquired for the Tocks Island project, respondent had purchased some 3,800 acres of land in the nearby Pocono Mountains as a replacement site for its camping operations (Pet. App. 6a; Tr. 578-579). It continued, however, to use the original facilities along the Delaware through 1973 (Tr. 68). Before trial, the government offered to pay respondent $485,400 as just compensation, based on the fair market value of the land taken. Respondent rejected the offer, claiming that the cost of developing a camp at its new site would exceed $5.8 million. Accordingly, prior to trial respondent sought a ruling that the proper measure of just compensation was the cost of constructing replacement facilities at its new site, rather than the fair market value of the condemned property. Pet. App. 78a-79a.

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[1] The condemnation action was brought under the Declaration of Taking Act, ch. 307, 40 U.S.C. 258a, and Section 2 of the Act of September 1, 1965, Pub. L. No. 89-158, 79 Stat. 612, 16 U.S.C. 460o-1, which authorized the Secretary of the Army to acquire land for the Tocks Island Recreation Project (A. 8-9).

The district court rejected respondent's argument. It held that only where the condemnee is a governmental entity, which holds property in trust for the public and is obliged to replace the condemned facility, is just compensation properly measured by the cost of a substitute facility rather than by fair market value (A. 39-48).

B. The interlocutory appeal

On an interlocutory appeal under 28 U.S.C. 1292 (b), the Third Circuit reversed (Pet. App. 76a-87a). While expressing no opinion on the validity of respondent's estimate that it would cost $5.8 million to develop replacement camping facilities at the new site, the court noted that it was undisputed that the government's offer of $485,400 would be insufficient to provide the facility respondent planned (*id.* at 79a). The court framed the issue before it as follows (*ibid.*):

> Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission. Thus the question presented is the extent to which owners of single purpose facilities, operated not-for-profit for a religious or charitable purpose (and having no ready market) are entitled to be indemnified when the federal government condemns the facilities. A closely analogous case would be the condemnation of an ancient church building still in active use for religious purposes.

The court rejected the government's position that the substitute facilities measure of compensation was available only to governmental entities having a legal obligation to replace the condemned facilities, stating that such an approach "would produce the anomalous result that the federal government's fifth amendment duty of fair compensation * * * would vary according to the vagaries of local law" (*id.* at 83a). The court said it would follow instead the approach of the Court of Appeals for the Second Circuit, which held in *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 (1968), that the substitute facilities measure was applicable to the condemnation of a government-owned facility "reasonably necessary for the public welfare."

The court of appeals further noted that the "taking clause" of the Fifth Amendment makes no special provision for governmental property, and observed that providing a higher measure of compensation for governmental property might encourage discriminatory condemnation of private property (Pet. App. 85a-86a). The court concluded (*id.* at 87a)

> that the substitution of facilities measure of fair compensation is available to private owners of non-profit community facilities as well as to public owners of such facilities, in appropriate cases.

The court described such cases as those in which the facilities have no ready market and are "reasonably necessary to public welfare" (*id.* at 83a; see also *id.* at 20a-27a).[2] The court expressed no opinion on whether application of the substitute facilities test would be appropriate in this case (*id.* at 87a).

C. The trial

On remand, the trial was divided into two phases. The issue in the first phase was whether the substitute facilities measure of compensation was applicable. The district court ruled that in order to invoke the substitute facilities measure, respondent was required to establish (1) that the camps were a not-for-profit facility, (2) that they were unique, (3) that there was no ready market available, and (4) that their continued operation was reasonably necessary to the community (see Pet. App. 71a).

Respondent presented evidence that it is a not-for-profit corporation whose purpose is promoting the Christian religion according to the tenets of the Lutheran Church (A. 95). Respondent also presented evidence that it did not operate the camps on a profit-making basis but subsidized them, in one recent year contributing, together with its sister Northeastern Pennsylvania Synod, some $30,000 of the camps' operating expenses (A. 92).

Respondent's president testified that the camps provided "an educational, religious, [and] charitable experience for boys and girls of Northeastern Pennsylvania" (A. 91). The camps were open to both Lutheran and non-Lutheran children, although non-Lutheran children paid a slightly higher fee (A. 96, 113-114, 127-128). Inner-city youths and handicapped children also attended (A. 114-116). Respondent's president explained that the camps were "consistent with the purpose of the Synod" because of their effort to "communicate about the world and about creation, about the presence of God," and their "effort to talk about Christian values and as they relate in life" (A. 96-97). The camps provided classes in religion, along with nature study, arts and crafts, canoeing, gymnastics, and poetry (A. 109-110). Each camp had a chapel, and evening devotions were held in each camp (A. 120).

To establish that the camps were unique and that there was no ready market,[3] respondent presented the testimony of a consultant who stated that other camping sites along the Delaware River were difficult to find (A. 139). Although there were a number of nearby camps on the market between 1966 and 1972, there was no single camp or combination of camps available at one time that would have been comparable to respondent's three camps, which could be operated as a unit because they were located a few miles from each other and were connected by the river and public road (A. 142-143, 162-163). However, respondent's expert witness also testified that on the date of the taking the camps had a fair market value (A. 143-144), and the camp's executive director stated that the location, facilities, and other factors made these three tracts "a good camp," marketable to an interested buyer (A. 118-119).

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[2] Compare, however, the subsequent interpretations of the opinion by Judge Stern (*id.* at 30a-31a) and Judge Rosenn (*id.* at 44a n.1).

[3] As explained in Judge Rosenn's dissenting opinion on the second appeal (Pet. App. 46a-48a), the evidence presented by the parties on this point reflected their differing interpretations of the "no ready market" requirement. The government argued that there was a ready market for the sale of respondent's property, whereas respondent contended that there was no ready market because respondent could not purchase a comparable property at a cost roughly equal to the fair market value of the property taken. Judge Rosenn, analyzing each of the references in the district court's charge (*id.* at 47a-48a), concluded that the charge adopted respondent's theory.

The government's expert described 11 sales of camps between 1966 and 1972 in the county where respondent's camps were located (Tr. 263-264, 269-276). He said respondent's camping facilities were "average to above average" in comparison with the other 45 summer camps in that county, and he estimated that respondent's camps could have been sold to a ready purchaser within six months to one year (A. 142; Tr. 256-258). He also testified that there were several combinations of two or more camps sold in recent years in the county that would have been equivalent to respondent's three camps (Tr. 609-621, 652-655).

The remainder of the testimony concerned the cost of building replacement camping facilities at respondent's new 3,800-acre site in the Poconos. John Levkulic, a civil engineer, had been retained by respondent to prepare a cost estimate for a facility functionally equivalent to the camps on the Delaware (A. 145-146). He stated that in addition to replicating the features found at the original facility, it was necessary to comply with the slightly larger cabin size required by the American Camping Association, to increase slightly the number of toilets and showers, and to comply with other health and sanitary requirements imposed by state and local governments (A. 147-148). Additional costs that respondent expected to incur at the new site included the cost of a dam to create a lake (A. 149), three beaches on the new lake (A. 149), a one-and-one-half mile access road to reach the property from the closest public road (A. 150-151), a bridge for a road over a creek to reach the other side of the projected lake (A. 151), a sewage treatment plant and electric transmission interconnecting lines (Tr. 366-367), and installation of a water system and power lines (A. 151-153). Levkulic concluded that the total cost of constructing the substitute facility, not including the $321,000 expended earlier to purchase the land, would be $4,361,633 (A. 153-154). He stated that this was a "conservative" estimate (*ibid.*).

At the close of 10 days of testimony in the first phase of the trial, the court submitted the case to the jury with three special interrogatories: (1) does the substitute facilities measure of compensation apply in this case?; if so, (2) what would be the cost of such facilities?; and (3) as of what date should the substitute facilities measure be applied? (A. 170). The jury found that the substitute facilities measure was not applicable, and accordingly did not reach the other two interrogatories (A. 171).

The second phase of the trial consisted of testimony presented by the government and respondent on the fair market value of the camps. After hearing two days of testimony, the jury returned an award of $740,000 (A. 171-172).

Respondent moved for a new trial, claiming error only with respect to the substitute facilities question in the first phase of the trial. Following reassignment of the case after the death of the original trial judge, the district court denied the motion for a new trial (Pet. App. 66a-75a). Respondent appealed for the second time.

D. The second court of appeals decision

A sharply divided panel of the Third Circuit reversed again (Pet. App. 1a-63a).[4] Judge Van Dusen, in an opinion announcing the judgment of the court and joined in part by Judge Stern, concluded that as a result of the district court's instructions and certain comments made by government counsel in summation,[5] the special interrogatory had been submitted to the jury in a confusing and misleading manner. The majority determined that even though respondent had not objected to the district court's instruction on the criteria for application of the substitute facilities measure of compensation, or to the form of the special interrogatory, reversal was required because the jury had been left " 'without adequate guidance on a fundamental question,' " and "[f]ailure to rectify this error could result in a miscarriage of justice because it could mean that the Synod would receive several million dollars less in compensation than that to which it is entitled" (*id.* at 9a).

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[4] One of the errors alleged by respondent was that the question whether the substitute facilities test applied should have been decided by the court as a matter of law instead of being given to the jury. At trial the government had argued that the question should be decided by the court, citing *United States* v. *Reynolds*, 397 U.S. 14 (1970) (Pet. App. 7a n.1). Respondent neither joined in this argument nor objected when the court ruled that the interrogatory would be submitted to the jury (*ibid.*). Because respondent had failed to challenge this ruling in the district court, the court of appeals declined to review it (Pet. App. 7a n.1).

[5] The government had argued in summation that even though respondent had not been operating its camps for monetary profit, testimony of respondent's witnesses could lead to the conclusion that the camps were operated for a "spiritual profit," in the sense of promoting the Lutheran religion or religious teachings (Pet. App. 10a-11a). The majority of the court of appeals held that these remarks misstated the law, since the court's opinion on the interlocutory appeal had referred only to profit in the monetary sense (*id.* at 11a). Moreover, since these remarks might have suggested that respondent used the camps to proselytize, and thus might have encouraged the jury to find against respondent so that taxpayers' money would not be used to build new camps where campers could be converted to the Lutheran faith, the court criticized the remarks as inaccurate and highly prejudicial (*id.* at 13a). Judge Stern, who concurred, agreed that the remarks were improper, but considered that such a line of argument was "justified—even compelled" by the court's interlocutory ruling (*id.* at 37a-38a). Judge Rosenn, who dissented, argued (*id.* at 59a n.12) that this line of argument was permissible, though it "may encounter first amendment problems at some point."

The court of appeals majority restated the holding of the earlier interlocutory appeal as follows (*ibid.*):

> In *564.54 Acres I* we held that the substitute facilities doctrine applied to privately owned property if three conditions were met: (1) the property must be operated on a not-for-profit basis; (2) there must be no ready market for the particular type of property; and (3) the property, or facilities, must be "reasonably necessary to the public welfare."

The majority found that the district court's instructions regarding two of these conditions were not entirely consistent with the interlocutory ruling. The instructions on the requirement that there be no ready market contained "no fundamental error" but were "somewhat confusing at one point," so that clarification of this condition by the court of appeals would be helpful to the district court on remand (Pet. App. 15a). The majority accordingly explained (*id.* at 18a; footnote omitted) that

> regardless of whether the Synod could have sold the camps, and regardless of whether the camps had fair market value, this condition of the substitute facilities doctrine is met if the Synod could not have replaced the camps' facilities in the market place for a cost roughly equivalent to the fair market value of the camps.

With respect to the requirement that the facility be " 'reasonably necessary to public welfare,' " the majority found that the district court's instructions had been confusing and misleading. The court explained

that to meet this condition a facility need not be entirely necessary or indispensable to the community, but need only "provide a benefit to the community that will not be as fully provided after the facility is taken" (*id.* at 26a). The court concluded that even though the district court's instruction had referred to " 'fulfilling a community need or purpose,' " it had been erroneous because it "never equated 'reasonably necessary' with community benefit," and because it seemed to require a showing of strict necessity rather than simply community benefit (*ibid.*).[6]

The majority accordingly remanded the case for a new trial pursuant to the standards explained in its opinion.

Judge Stern concurred, under compulsion of the court's earlier decision on the interlocutory appeal (*id.* at 28a-39a). He agreed that the district court's instructions were "confusing, contradictory, and, in some measure, erroneous" (*id.* at 30a). But he criticized both the earlier decision and the revised standards set forth by Judge Van Dusen. With respect to the "reasonably necessary" or "community benefit" standard in particular, he observed that "application of this standard illuminates the basic flaw in the interlocutory appeal's holding that private, non-profit owners are entitled to the cost of substitute facilities measure of compensation" (Pet. App. 32a-33a).

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[6] Restating the three conditions, Judge Van Dusen (in a portion of the opinion not joined by Judge Stern) stated the third condition solely in terms of "community benefit": "[T]he facility must have provided a benefit to the community that will not be as fully provided after the facility is taken," and noted that he had deliberately avoided use of the expression "reasonably necessary" (*id.* at 28a & n.17).

Judge Stern pointed out that, once the substitute facilities measure of compensation is extended to condemnees that are not governmental entities, "the courts are simply in no position to insure that the compensation award will continue to be devoted to serving a community purpose or the particular community purpose which the jury has found makes the community a better place in which to live" (*id.* at 35a). He questioned, moreover, why the extension should be limited to private entities that operate on a not-for-profit basis, since profit-making facilities also provide benefits to the community (*id.* at 34a-35a). And he noted that "a windfall *necessarily* occurs upon application of the doctrine of the cost of substitute facilities," since "the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated facilities with brand new ones," no deduction being allowed for depreciation (*id.* at 35a-36a & n.2 (emphasis in original)).

Where church-owned property is involved, Judge Stern found significant constitutional concerns. Supervision of the use of the condemnation award to ensure its devotion to substitute facilities might improperly entangle church and state, while if the condemned facilities were not replaced, the payment of a sum far in excess of fair market value might be an impermissible aid to religion (*id.* at 36a-37a). "[M]ore fundamentally," Judge Stern considered that the basic inquiry into whether a religious organization provides a "benefit" to the community "is obnoxious under our constitutional framework" (Pet. App. 37a).

Judge Rosenn dissented (*id.* at 40a-63a). He thought that the trial court's instructions were consistent with the court's opinion on the interlocutory appeal, and that any error in them was "minimal and nowhere near the magnitude of fundamental" (*id.* at 40a). He concluded that in view of the ambiguity of the court's interlocutory opinion and the novelty and uncertainty of the points at issue, the majority "exceed judicious expectations by demanding that a district judge conform to standards never before enunciated by the appellate court" (*id.* at 45a).

SUMMARY OF ARGUMENT

Measuring the "just compensation" due to certain private non-profit condemnees not by the fair market value of the property taken, but by the amount necessary for them to acquire substitute facilities, departs from the fundamental rule of eminent domain law that limits just compensation to the monetary equivalent of the property taken, and that excludes other forms of loss suffered by the condemnee from the constitutionally required award.

I.

The decisions of this Court have defined just compensation as the full monetary equivalent of the property taken, and have established the concept of "market value" as the basic measure of monetary equivalence. The market value standard was chosen deliberately in order to strike a fair balance between the needs of the person whose property is taken and of the public who must pay the bill.

A corollary to the monetary equivalence rule is the rule that just compensation does not encompass consequential losses, such as losses that result from the owner's difficulty in finding other premises to which he can move his business. This Court has observed that consequential losses are speculative and variable, and that just compensation should not vary according to the owner's good fortune, or lack of it, in finding satisfactory premises to which he can transfer his activities. The Court has further held that just compensation does not encompass the value of the property to the owner deriving from his unique need for it.

The court of appeals, in holding that the owner of private nonprofit facilities may claim a compensation award based on the cost of substitute facilities, has abandoned these fundamental principles in favor of a doctrine that disregards the monetary equivalent of the condemned property and expressly seeks to compensate for consequential losses.

As the court of appeals recognized, the cost of substitute facilities does not measure the value of the condemned property and often greatly exceeds that value. In this case, for example, the jury found the market value of the condemned property to be $740,000, but respondent claims the cost of substitute facilities will exceed $5 million. The court of appeals nonetheless approv~~ing~~ed application of the substitute facilities doctrine to nonprofit organizations such as

respondent, regardless of whether the condemned property had a fair market value. It reasoned that fair market value would not be just compensation where it would not ensure that the condemnee could afford to continue its activities at a new site. This reasoning is inconsistent with this Court's decisions holding that the constitutional measure of just compensation does not vary with the condemnee's unique need for his particular property or with his success in finding a place to which he can move.

II.

The court of appeals sought to justify its innovation by extending a line of lower court authority that has applied the substitute facilities doctrine to the condemnation of governmentally owned property. Those decisions are based on considerations unique to public condemnees and should not be extended to condemnation of privately owned property.

The substitute facilities doctrine originated in cases involving the condemnation of certain kinds of governmentally owned property—such as bridges, streets, and sewer systems—where the market value test is unworkable because the facilities are never bought and sold in the open market. In such cases, the lower courts have concluded that the proper measure of just compensation is the amount necessary to construct a substitute for the condemned facility, since the governmental entity holds that facility in trust for the public and is under an obligation to replace it. If no replacement is shown to be necessary, the cost of a substitute is not awarded. The substitute facilities doctrine has now been extended by the lower courts to other kinds of governmental properties—such as schools and other public buildings—for which a market value arguably can be established. But the rationale is the same: where a governmental entity holds condemned facilities in trust for the public and must provide a replacement, the cost of substitute facilities will be awarded to indemnify the community—through its trustee—for its loss.

In extending this doctrine to private condemnees, the court of appeals ignored the fundamental dichotomy in our legal system between public and private entities. An owner of private property, even if he operates the property in a way that provides a "benefit to the community," still has no legal obligation to the community at large. The community is in no sense the owner of the property. An increased award to the private owner which is justified as compensation for the public's loss thus violates the cardinal rule that just compensation is reimbursement *to the owner* for the property taken. Moreover, since a private condemnee has no duty to replace condemned facilities that provided a benefit to the community, an award in excess of the monetary equivalent of the property does not ensure continuation of the public benefit.

The court of appeals sought to avoid the critical distinctions between public and private entities by limiting its doctrine to private facilities that provide a "benefit to the community." This ambiguous standard leaves at large both identification of the relevant "community" and specification of the kinds of "benefits" that will be acceptable. It invites exceptionally free value judgments, as illustrated by the statement of the court of appeals that respondent's camps provided a benefit to "the entire community of Eastern Pennsylvania" if their admission of youths from inner-city Philadelphia helped to reduce juvenile crime (Pet. App. 26a), and by the instruction of the district court that "the furthering of a Church's religious mission may itself constitute a service to the community" (Pet. App. 55a n.10). The majority's reliance on the jury to resolve the inherent ambiguity of its standard ignores the fact that the jury's role in condemnation proceedings is limited to determining the precise amount of compensation due.

Moreover, if the test is benefit to the community, there is no principled reason for limiting the substitute facilities doctrine to nonprofit private entities as distinguished from profit-making ones. Business entities may also provide benefits to the community—as, for example, by employing youths from inner-city Philadelphia.

In any event, awarding a private condemnee the cost of substitute facilities goes beyond what is required to make the condemnee whole. Under the court of appeals' decision, the condemnee receives an award that exceeds fair market value and that is premised, not on the condemnee's own loss, but on a loss to the community that the condemnee is not legally obliged to make good. What is more, the award will be sufficient to construct new facilities even if the condemned facilities were ancient and in disrepair, since the court of appeals rejected any deduction for depreciation.

III.

Where the condemned property belongs to a church or other religious organization, application of the substitute facilities doctrine also offends the First Amendment.

First, the court of appeals' decision requires a threshold inquiry into whether a religious facility provides a "benefit to the community." Courts in this country have no business making such an inquiry. And governments—federal, state, and local—should not be required to defend their treasuries by presenting evidence and argument to establish that a religious organization's activity does not provide a benefit to the community. The First Amendment requires the government to maintain a neutral position toward religious groups, neither favoring them nor penalizing them according to official judgments regarding the public benefits they provide.

Second, a compensation award to a religious organization based on the cost of substitute facilities is open to challenge as an impermissible aid to religion. Under the court of appeals' decision, such an award—which will in many cases greatly exceed the monetary value of the condemned property—is employed to enable private condemnees to reestablish activities found to benefit the community. Where the activity is religious, there is a First Amendment problem. Here, respondent's camping program is in part religious, and the district court charged that the furtherance of respondent's religious mission could itself be considered a community benefit. The Establishment Clause, however, prohibits the sovereign's sponsorship, financial support, or active involvement in religious activity.

Third, since a religious organization is a private entity, it may, unlike a public entity, choose not to use its substitute facilities award to replace its condemned facilities. In this case, respondent would remain free to use its award to train missionaries, pay ministers, or serve any of its other institutional purposes. The award would thus constitute an impermissible aid to religion. *Tilton* v. *Richardson*, 403 U.S. 672, 682-684, 692 (1971). Yet any attempt to supervise or control a religious entity's use of its condemnation award to ensure continuation of the "community benefit" that produced the award would impermissibly entangle the government in the operations of a religious organization.

Finally, the availability of a substantial financial benefit for religious entities under the substitute facilities doctrine will encourage community divisions along religious lines, with supporters and opponents of particular religious groups seeking to influence governmental decisions concerning which properties should be condemned. Political division along religious lines is one of the evils that the First Amendment was designed to prevent.

ARGUMENT

I. JUST COMPENSATION UNDER THE FIFTH AMENDMENT IS THE MONETARY EQUIVALENT OF PROPERTY TAKEN FOR PUBLIC USE, NOT THE COST OF ACQUIRING OTHER FACILITIES SUITABLE FOR THE CONDEMNEE'S PURPOSE

The decision of the court of appeals that certain nonprofit condemnees are entitled to an award sufficient to acquire substitute facilities departs from the fundamental principle of eminent domain law that defines just compensation as the monetary equivalent of the property taken, and that excludes other forms of loss suffered by the condemnee from the constitutionally required award. As the court of appeals acknowledged (Pet. App. 82a), "the cost of substitute facilities in most instances will have no relationship to 'valuation'" of the condemned property. The traditional limitation of compensation to the monetary value of the condemned property reflects a carefully fixed balance between the interests of the public and those of the person whose property is condemned. The wide difference between the two measures in the instant case—where the jury found fair market value to be $740,000, and the substitute facilities claim exceeds $5 million—demonstrates vividly that turning away from this traditional limitation will produce awards far exceeding those provided under the established standards.

A. Just compensation is the monetary equivalent of a property interest taken for public use

The Fifth Amendment provides that private property may not be taken for public use "without just compensation." This Court has defined just compensation as "the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); *United States* v. *Miller*, 317 U.S. 369, 373 (1943). The "guiding principle" is the indemnification of the owner of the condemned property, who "'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.'" *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961), quoting *Olson* v. *United States*, 292 U.S. 246, 255 (1934).

To determine monetary equivalence, this Court "early established the concept of 'market value': the owner is entitled to the fair market value of his property at the time of the taking." *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474 (1973), citing *New York* v. *Sage*, 239 U.S. 57, 61 (1915). Fair market value is "what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, *supra*, 317 U.S. at 374; *New York* v. *Sage*, *supra*, 239 U.S. at 61.

The concept of "monetary 'market value'" was chosen to strike a balance between "the public's need and the claimant's loss," *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949).[7] It is a measure " 'just' both to an owner whose property is taken and to the public that must pay the bill." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). Market value "may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain." *Olson* v. *United States*, *supra*, 292 U.S. at 255.

When there is an active market in property of the sort condemned, market value is readily established by evidence of sales of comparable properties.[8] But when the condemned property is of a kind seldom bought and sold, "resort must be had to other data to ascertain its value." *United States* v. *Miller*, *supra*,

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[7] "The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner." *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 280 (1943). See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1224-1226 (1967).

[8] "[I]n the valuation of readily salable articles, price at the market nearest the taking is, at least in the usual case, a practical rule of thumb, and one that is most likely to place the claimant in the pecuniary position he occupied before the taking." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, *supra*, 338 U.S. at 404.

317 U.S. at 374. Value may be established by evidence of the capitalization of net income from the property, or the cost to reproduce the condemned property minus depreciation. See 4 *Nichols on Eminent Domain* §§ 12.32[3][b]-12.32[3][c] (3d. ed 1977). Such evidence "may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, *supra*, 338 U.S. at 402. Even when "the property is of a kind seldom exchanged," so that "it has no 'market price' " in the sense of an actual market, value compensable under the Fifth Amendment is only the estimated value of the property to a hypothetical purchaser in a free market transaction—"only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5-6 (1949). As Mr. Justice Frankfurter explained for the Court in *Kimball Laundry* (*id.* at 5), this concept of value has been deliberately chosen as the most appropriate measure of the public's obligation:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obliga-

tion to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship. See *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508-09.

B. Just compensation does not include consequential damages and does not ensure that the owner will be able to purchase substitute facilities

This Court has repeatedly recognized the limitations inherent in the traditional measure of just compensation. "[T]he compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." *United States* v. *General Motors Corp.*, 323 U.S. 373, 379 (1945). Accordingly, "not all losses suffered by the owner are compensable under the Fifth Amendment." *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281 (1943).

One class of loss for which the Fifth Amendment provides no compensation is "consequential damages," which have been held to be too variable and speculative to be included as part of the constitutionally required measure of just compensation. *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378

(1946). In particular, "loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will * * * is denied compensation as consequential." *Kimball Laundry Co., supra*, 338 U.S. at 12.[9] Compensation is denied even if a business is destroyed as a result of the taking of the land on which it was located. In *Mitchell* v. *United States, supra*, 267 U.S. at 345, for example, the Court concluded that the destruction of a condemnee's business, which could not be relocated because there was no other land suitable for growing and processing a special type of corn, was an "unintended incident of the taking of land" for which the Fifth Amendment provided no compensation. In *Almota Farmers, supra*, the Court restated that *Mitchell* had held "that the Government was not obliged to pay for business losses caused by condemnation." 409 U.S. at 476 n.2; see *id.* at 483 (Rehnquist, J., dissenting); *United States ex rel. TVA* v. *Powelson, supra*, 319 U.S. at 282.[10]

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[9] The temporary taking of property presents a special situation, and the condemnee's expenses in moving in and out of the property may be compensable, despite the general rule to the contrary. Compare *United States* v. *General Motors Corp., supra*, 323 U.S. at 373, with *United States* v. *Westinghouse Electric & Manufacturing Co.*, 339 U.S. 261, 264-268 (1950).

[10] The structure of the Fifth Amendment itself highlights the distinction between compensation limited to the value of the property interest taken, and compensation for consequential losses the owner may have suffered. As this Court observed in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893):

> [J]ust compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this

In the Court's opinion in *Kimball Laundry, supra*, 338 U.S. at 12, Mr. Justice Frankfurter explained the rationale of excluding consequential damages as follows:

> When a condemnor has taken fee title to a business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going-concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. See *Sawyer* v. *Commonwealth,* 182 Mass. 245, 65 N.E. 52, per Holmes, C.J. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell* v. *United States,* 267 U.S. 341.

The denial of compensation for consequential damages is also founded on the principle that just compensation does not encompass the value of the property to the owner deriving from his "unique need" for it or his "idiosyncratic attachment to it." *Kimball Laundry, supra,* 338 U.S. at 5. Neither the frustration of the owner's plans for the use of the property, nor his inability to carry out profitable contracts

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Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken.

because of the taking, is compensable. *United States ex rel. TVA* v. *Powelson, supra,* 319 U.S. at 282-284; see 4 *Nichols on Eminent Domain* § 13.33 (3d ed. 1977). As a constitutional matter, it is irrelevant that compensation for the value of the condemned property may be insufficient to enable the condemnee to purchase other property on which he can carry out his activities as satisfactorily as before the taking.

Recognizing the constitutional limits of just compensation, Congress has provided by statute for the payment of certain categories of consequential damages resulting from federal condemnations. In particular, recognizing that the need to relocate may cause hardship, Congress has enacted statutory measures designed to offset relocation expenses in specified cases. The most important of these measures is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, which replaced several narrower statutes providing relocation benefits or services for persons displaced when particular federal agencies acquired land.[11] The Relocation Act provides that when the federal government's acquisition of real property will result in the displacement of any business—including any activity of a nonprofit organization (42 U.S.C. 4601(7)(C))—the owner of the displaced business is entitled to his "actual reasonable expenses in moving" his business and his "actual reasonable expenses in searching for a replacement business." 42 U.S.C. 4622(a)(1) and (3). Alternatively, the owner of a displaced business that cannot relocate "without a substantial loss of its existing patronage" may elect to accept a fixed amount, not less than $2,500 nor more than $10,000, "equal to the average annual net earnings of the business." 42 U.S.C. 4622(c).[12] The Act also provides relocation benefits for persons displaced from their place of residence as the result of a federal acquisition, including moving expenses, a dislocation allowance, and a supplement of up to $4,000 toward rent for a comparable safe and decent dwelling. 42 U.S.C. 4622, 4624(1). The legislative history of the Relocation Act reflects Congress's understanding that these statutory benefits reach losses not compensable under the Fifth Amendment. See H.R. Rep. No. 91-1656, 91st Cong., 2d Sess. 1-2 (1970).[13]

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[11] **The pre-1970 statutes included the Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58, as amended, ch. 836, 49 Stat. 1075, 1080 (1935), which gave TVA the authority to "advise and cooperate" in the "readjustment" of persons displaced from land acquired by TVA; the Act of September 28, 1951, ch. 434, Section 501 (b), 65 Stat. 364 (1951), to authorize certain construction of military and naval installations, etc., which provided for reimbursement to tenants and landowners of moving and related expenses in connection with the acquisition of properties for military use; and the Act of May 29, 1958, Pub. L. No. 85-433, Section 1, 72 Stat. 152 (43 U.S.C.**

(1964 ed.) 1231 (repealed in 1971)), which provided for payment of expenses incurred as a result of acquisitions of property for the construction, maintenance, or operation of developments under the jurisdiction of the Secretary of the Interior.

[12] The owner of a business that is "part of a commercial enterprise having at least one other establishment not being acquired by the United States, which is engaged in the same or similar business" as the condemned property, may not elect this alternative measure. *Ibid.*

[13] Several states have adopted similar statutory provisions. See 4 *Nichols on Eminent Domain* § 13.3, at 13-154 to 13-161 (3d ed. 1977).

C. The cost of substitute facilities concept does not measure the monetary equivalent of the condemned property, and it permits recovery of consequential damages

In holding that the compensation due to a private condemnee may be measured by the cost of substitute facilities, the court of appeals abandoned the cardinal rule that just compensation is limited to the monetary equivalent of the condemned property in an effort to devise a measure that would encompass consequential losses.

The cost of substitute facilities is not a measure of the value of the property taken. As the court of appeals itself acknowledged (Pet. App. 82a), "the cost of substitute facilities in most instances will have no relationship to 'valuation.'" In many cases the cost of substitute facilities will greatly exceed the value of the condemned property. In this case, for example, the jury found the market value of respondent's condemned property to be $740,000, but respondent claims that the cost of constructing substitute facilities will be in excess of $5 million.[14] This wide difference results in large part from the fact that the replacement facilities will be not only newer, but more elaborate, than the condemned facilities. Whereas some of respondent's condemned buildings were constructed as early as 1937 (Tr. 70), and none later than 1955 (Pet. App. 41a), all of the buildings at the substitute site will be new. And the substitute facilities will include larger cabins, more toilets and showers, a sewage treatment plant, and other improvements over the condemned facilities (see pages 8-9, *supra*).

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[14] Pet. App. 78a-79a; cf. A. 154.

The court of appeals sanctioned the use of the substitute facilities measure because of a fundamental misunderstanding of the function of just compensation. The court held (Pet. App. 83a) that the substitute facilities measure should be applied to private nonprofit entities because "[s]imply stated this method insures that sufficient damages will be awarded to finance a replacement for the condemned facility. Nothing less would afford just compensation." The court concluded that regardless of whether respondent could have sold the condemned camps and "regardless of whether * * * the camps had [a] fair market value," respondent (assuming that it met the court's other tests) would be entitled to the cost of substitute facilities if it "could not have replaced the [condemned] facilities in the marketplace for a cost roughly equivalent to the fair market value of the [condemned facilities]" (Pet. App. 18a). But, as we have shown, it is settled law that just compensation does not "vary with the owner's good fortune or lack of it in finding premises suitable for the transferance" of his activities (*Kimball Laundry*, *supra*, 338 U.S. at 12), and that just compensation is not increased because of the owner's "unique need" for his particular property in order to continue his chosen activities (*id.* at 5).[15]

The court of appeals sought to justify its departure from the established principles of eminent domain law by extending a line of lower court authority which has applied the substitute facilities concept to condemnation of governmentally owned property. As we will now explain, these decisions do not justify abandoning the rule that a private condemnee is fully compensated by an award equivalent to the monetary value of the condemned property.

II. THE LOWER COURTS CREATED THE SUBSTITUTE FACILITIES DOCTRINE AS A NARROW EXCEPTION TO THE MONETARY EQUIVALENCE RULE IN ORDER TO MEET THE UNIQUE NEEDS OF PUBLIC CONDEMNEES; THE DOCTRINE SHOULD NOT BE EXTENDED TO PRIVATELY OWNED PROPERTY

A. The substitute facilities doctrine is based on considerations unique to public condemnees

Property owned by state and local governments is subject to the federal power of eminent domain,[16] and is considered to be "private property" for which compensation must be paid under the Fifth Amendment. See, *e.g.*, *United States* v. *Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir.), cert. denied, 379 U.S. 900 (1964); *Jefferson County* v. *TVA*, 146 F.2d 564 (6th Cir.), cert. denied, 324 U.S. 871 (1945); *Town of Bedford* v. *United States*, 23 F.2d 453 (1st Cir. 1927).

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[15] Indeed, under the court of appeals' analysis, a condemnee's entitlement to an award based on the cost of substitute facilities would vary not only according to his "good fortune or lack of it" in finding a replacement property, but according to the degree of "skill and business acumen" that reasonably could be expected of him. The court held (Pet. App. 18a & n.7) that the substitute facilities measure should be applied "if the owner, exercising reasonable diligence," could have purchased a functionally equivalent replacement at a cost roughly equal to the market value of the condemned facilities. And the court observed (*id.* at 18a n.7) that "reasonable diligence" was "a question of fact," and that "the directors of a charitable or religious organization are not necessarily expected to exercise the skill and business acumen of a profit-motivated business."

[16] *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941); see *United States* v. *Carmack*, 329 U.S. 230, 242 (1946).

Although this Court has never considered the question,[17] the lower federal courts have established the substitute facilities doctrine as "an alternative method [of compensation] available in public condemnation proceedings" in order "to meet the unique needs of public condemnees." *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 803 (2d Cir. 1968). The doctrine originated in cases involving the condemnation of certain kinds of governmentally owned properties, such as streets, highways, bridges, and sewer systems, where the traditional fair market value test is inherently unworkable because the facilities are never bought and sold in the open market. As the court explained in *Mayor and City Council of Baltimore* v. *United States*, 147 F.2d 786, 790 (4th Cir. 1945):

> Frequently it occurs that the taking of a street causes substantial loss for which the city must be compensated. This happens when the municipality is required to establish and improve another street in place of the one condemned or to relocate underground structures such as water mains or utility pipes. In such cases the measure of just compensation is the cost of supplying the substitute, as was held in [citations omitted]. This measure of damages is accepted because the city's property in the street has no market value, and resort must be made to other data to ascertain the value of what is taken.

See *State of Washington* v. *United States*, 214 F.2d 33 (9th Cir. 1954) (highway); *Clarksville* v. *United States*, 198 F.2d 238 (4th Cir. 1952), cert. denied, 344 U.S. 927 (1953) (sewer system); *City of Fort Worth* v. *United States*, 188 F.2d 217 (5th Cir. 1951) (street); *Woodville* v. *United States*, 152 F.2d 735 (10th Cir.), cert. denied, 328 U.S. 842 (1946) (streets, sidewalks, and alleys); *United States* v. *Des Moines County*, 148 F.2d 448 (8th Cir. 1945) (streets).

In measuring the compensation due to a public condemnee, the courts have emphasized the peculiar nature of public ownership. A public entity, unlike a private owner, "does not hold the property for its own benefit or private gain but for the public need." *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge*, 246 F.2d 823, 824 (3d Cir.

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[17] The court of appeals (Pet. App. 86a-87a) cited *Brown* v. *United States*, 263 U.S. 78 (1923), as "the genesis of the substitution of facilities method of measuring fair compensation." However, *Brown* did not consider the scope of just compensation under the Fifth Amendment. The question posed in *Brown* was the validity of a federal statute authorizing the government to condemn additional land adjacent to the property that would be flooded by a federal dam for the purpose of relocating a town that had been condemned for the project. The Court upheld Congress's power to authorize a taking for this purpose.

1957). The distinction was stated in *Jefferson County* v. *TVA*, *supra*, 146 F.2d at 565, as follows:

> The State or its political subdivision, holds, as a trustee, title to the easement for public highways and roads. A quasi corporation such as a city or county, holds such property by delegation of the general sovereign power, the authority for its acquisition and control being governmental and the interest exclusively that of the public. Looking at the title from any viewpoint, highway easements are totally unlike property of a private corporation held for its own benefit and used for its private gain or advantage. The political subdivision cannot deal in its roads and highways as a private corporation and thus when such property is taken by the power of the Federal Government, just compensation cannot be measured by the same standards as compensation for the taking of purely private property.

As the Second Circuit explained in *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803, the public condemnee's entitlement to the cost of acquiring a substitute for the condemned facilities flows from its obligation to provide a replacement:

> When the public condemnee proves there is a duty to replace the condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. The duty may be legally compelled or one which arises from necessity; the distinction has little practical significance in public condemnation. [Citations omitted.]

Accordingly, if replacement of the condemned property or facility is not shown to be necessary, the cost of a substitute need not be awarded:

> The true measure of compensation when a municipality's streets are condemned is the cost of providing any necessary substitutes. When no substitute facilities are necessary, it follows that no compensation is allowed. The rationale is clear. If the municipality has not had to provide substitutes, then it has suffered no financial loss and hence is not entitled to substantial damages. Indeed, the taking relieves it of the burden of maintaining such roads.

United States v. *City of New York*, 168 F.2d 387, 389-390 (2d Cir. 1948). See *United States* v. *Streets, Alleys & Public Ways*, 531 F.2d 882, 885-886 (8th Cir. 1976); *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge*, *supra*, 246 F.2d at 824; *Woodville* v. *United States*, *supra*, 152 F.2d at 737; *United States* v. *Arkansas*, 164 F.2d 943 (8th Cir. 1947).

The substitute facilities concept has subsequently been extended to other kinds of governmental properties, such as schools and other public buildings. See, *e.g.*, *United States* v. *Certain Property in the Borough of Manhattan*, *supra* (public swimming and recreation center); *United States* v. *Board of Education*, 253 F.2d 760 (4th Cir. 1958) (school). Even though some form of market value arguably could be established for these properties, the cost of substitute facilities has been awarded where necessary to indemnify the public condemnee for the loss of a facility that it will be required to replace. Thus, in the case of a public swimming and recreation center whose replacement was not statutorily required, the Second Circuit emphasized that the "duty to replace a condemned facility" could be one that "arises from necessity" as well as one that is "legally compelled." *United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803.

In sum, the rationale for awarding a public condemnee the cost of a substitute facility is that only this measure will provide full indemnity for the loss of publicly owned property that the condemnee, as trustee for the public, must replace. As the court explained in *United States* v. *Wheeler Township*, 66 F.2d 977, 984-985 (8th Cir. 1933):

> * * * we must be guided by this record as to what money loss will fall upon the township because of this condemnation. It is the duty of the township to maintain its roads and that duty can be enforced [reference to citations omitted]. The expense therefor comes from the taxpayers of the township, for whom the township is (in a sufficient sense) trustee and representative. The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and "the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town." [Citation omitted.] To the extent that this burden has been increased by this taking there is a deprivation for which the law requires compensation.

B. Extending the substitute facilities doctrine to privately owned property would not indemnify the community for its loss and would go beyond what is required to make the condemnee whole

The court of appeals erred in concluding (Pet. App. 86a) that "there is no basis for distinguishing between governmental and private community uses" for purposes of measuring just compensation under the Fifth Amendment. The substitute facilities doctrine was developed for governmental entities who hold essential public facilities in trust for the public and who must replace those facilities if they are condemned. The cases developing this doctrine "to meet the unique needs of public condemnees" provide no reason or authority for applying it—rather than the standard of fair market value—to privately owned property which is not held in trust for the public and which the condemnee has no obligation to replace, even though the condemnee may be a nonprofit entity. Giving the private condemnee an award in excess of the monetary equivalent of the condemned property does not indemnify the community for its loss, but rather results in a windfall to the condemnee.

1. *The owner of private property is fundamentally different from a public entity; the private owner has the right to use his property as he chooses, and he has no obligation to replace condemned facilities that may have provided a benefit to the public*

Our legal system recognizes an important dichotomy between public and private entities. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 171-177

(1972). Accordingly, although operation of private nonprofit facilities may provide a benefit to the public, the facilities are nonetheless private and are held and operated for the benefit of the owner. The owner has no trusteeship obligation to the public at large, and the community is in no sense the owner of the property. Any benefit to the community is an incidental result of the owner's unrestricted decision to use his property in the way he chooses. As the court below observed (Pet. App. 79a):

> Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission.

The court of appeals has attempted here, however, to award a private condemnee compensation for a loss claimed to have been suffered by the community.[18] This new doctrine not only blurs the distinction between public and private entities, but also contravenes the "guiding principle of just compensation" which is "reimbursement *to the owner* for the property interest taken." *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961) (emphasis added).

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[18] The court of appeals stated (Pet. App. 12a n.4): "One rationale for the substitute facilities measure is to indemnify not only the owner of the condemned facilities, but those who have an interest in the continuing existence of the facilities, in this case, according to the Synod, the general public." See also Pet. App. 25a-26a, 28a, 82a-83a.

A related distinction between public and private condemnees is that the private entity has no duty—neither one which is "legally compelled or one which arises from necessity" (*United States* v. *Certain Property in the Borough of Manhattan*, *supra*, 403 F.2d at 803)—to replace condemned facilities that may benefit the community. Recognizing that the substitute facilities doctrine was designed for governmental condemnees having a duty to replace essential public facilities, the court of appeals in its first, interlocutory decision adopted the test, taken from public-condemnee cases, that the property or facilities must be "reasonably necessary to [the] public welfare" (Pet. App. 83a; see Pet. App. 20a). In its second decision, the majority of the court relaxed its test. The court's new rule requires only that the condemned facility "must provide a benefit to the community that will not be as fully provided after the facility is taken" (*id.* at 26a), and Judge Van Dusen further advised that the words "reasonably necessary" should be avoided (*id.* at 28a n.17).[19] The court's efforts to adapt this portion of the substitute facilities doctrine to private condemnees make the measure of compensation turn on exceptionally free value judgments defining the relevant "community" and what constitutes a "benefit" to it.

In contrast to the precisely defined constituency or community to which a governmental condemnee is by law responsible, the relevant "community" that may receive a benefit from a private condemnee is ill defined. As the court of appeals explained (*id.* at 25a-26a), the relevant community may vary from the relatively few people who live within walking distance of a small neighborhood park to "the entire community of Eastern Pennsylvania" in this case, where respondent sought to show that its camps, by admitting youths from inner-city Philadelphia, helped to alleviate the "gang" problem and thereby reduce juvenile crime. The court of appeals offered no standards for defining the relevant community in future cases.[20]

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[19] Judge Stern did not join this part of the opinion. See Pet. App. 39a.

What constitutes a "benefit" to a community is equally uncertain. The court of appeals' opinion (Pet. App. 25a) states only that in order to invoke the substitute facilities doctrine a facility must "provide a benefit to the community or be rationally related to the public welfare." As Judge Rosenn pointed out in dissent (*id.* at 54a n.9), that vague standard might cover "private nonprofit swimming clubs, ice-skating clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations who might discern a need for their facilities * * *."[21] In reply, the

majority opinion relied on the jury as "a safeguard on the whims of the owners" of condemned property, reasoning that "since the jury is the conscience of the community, we must assume that any facility a jury finds beneficial to the community or rationally related to public welfare would not be found 'frivolous' by the community" (*id.* at 25a n.15).

But even if it is assumed that issues of this unchanneled vagueness would otherwise be appropriate for jury determination, the jury may not be relied on in condemnation cases to resolve the inherent ambiguity of the court of appeals' community benefit standard. This Court has pointed out that in condemnation proceedings the trial judge has discretion to eliminate a jury entirely, and that where a jury is employed the judge still has a role "much broader than he occupies in a conventional jury trial," being required to decide " 'all issues' other than the precise issue of the amount of compensation to be awarded." *United States* v. *Reynolds*, 397 U.S. 14, 20 (1970). And when juries are employed in condemnation proceedings, they "should not be given sophistical and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive." *Kimball Laundry Co., supra*, 338 U.S. at 20.

Moreover, if the "benefit to the community" test adopted by the court of appeals is valid, no rational basis appears for refusing to extend the substitute facilities doctrine to profit-making private entities as well as nonprofit ones. As Judge Stern pointed out (Pet. App. 34a-35a)—and as our economic system assumes—community benefits flow from many profit-making private facilities:

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[20] As Judge Rosenn noted in dissent (Pet. App. 53a n.8), the community in this case could also have been defined as "the Lutheran community, the community of camping age youngsters, the Philadelphia community, or the community of the state of Pennsylvania."

[21] The district court charged, and the court of appeals indicated no disapproval, that the jury could find "that the furthering of the Church's religious mission may itself constitute a service to the community." Tr. 798; Pet. App. 55a n.10; see pages 49-50 & note 29, *infra*.

> A privately owned factory enriches the community by providing jobs for its residents and monies for its tax coffers. A privately owned home benefits the community by sheltering some of its residents. A community may well be a better place in which to live if its residents have jobs, or shelter, just as it may be a better place to live if there are museums or summer camps open to its children or legitimate theatres run for profit.

The public may suffer a loss from the taking of profit-making facilities that is no less real and significant than the loss it may suffer when nonprofit facilities are taken.[22] Yet to depart from the market value measure of compensation in the case of any privately owned property that might be shown to provide a benefit to the public[23] would cast the concept of just

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[22] The loss may, indeed, be quite similar. The court of appeals noted (Pet. App. 26a) that "the Synod attempted to show that the camps helped alleviate the 'gang' problem in inner-city Philadelphia" and stated that "[i]f the camps did help reduce such juvenile crime, then they provide a benefit to the entire community of Eastern Pennsylvania, not just to the campers." If a private employer's business establishment in Philadelphia is condemned, why should he not be equally entitled to the substitute facilities measure of compensation if he employed inner-city youths at the establishment and thus contributed—not only during the summer, but all year—to alleviation of the gang problem and reduction of juvenile crime?

[23] The substitute facilities doctrine might thus dictate an increased award to the owner of a residential property who conducted Girl Scout meetings in her basement or who allowed neighborhood children to swim in her swimming pool.

compensation far adrift from its traditional legal moorings.

2. *An award to a private condemnee for the cost of substitute facilities goes beyond what is required to make the condemnee whole*

Awarding the cost of substitute facilities to a private condemnee is inconsistent with the principle that the condemnee " 'must be made whole but is not entitled to more.' " *United States* v. *Virginia Electric & Power Co.*, *supra*, 365 U.S. at 633, quoting *Olson* v. *United States*, *supra*, 292 U.S. at 255. The rule adopted by the court below would go beyond what is required to make the condemnee whole.

The decision below holds that the cost of substitute facilities is to be calculated with no deduction for depreciation of the existing facilities (Pet. App. 81a-82a). As Judge Stern pointed out (*id.* at 36a), "the condemnor is required to pay enough so that the condemnee can replace ancient, even dilapidated facilities with brand new ones."[24] In denying a deduction for depreciation, the court below made the substitute facilities rule more generous for private condemnees than the Second Circuit made it for public condemnees in the case on which the court relied. *United States* v.

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[24] In this case, for example, although the buildings on respondent's condemned campsites were constructed between 1937 and 1955, respondent claims the cost of constructing all new buildings at the substitute site (see pages 9, 31, *supra*).

Certain Property in the Borough of Manhattan, supra, 403 F.2d at 804 (see Pet. App. 82a-84a).[25]

The condemnee's windfall is enhanced by the inability of the courts or the community to ensure that the compensation award will be devoted to the particular community purpose that was found to justify the substitute facilities measure—or devoted to any other community purpose. A condemnee such as respondent, being a private entity, should and does remain free to employ and redirect its resources in accord with its own institutional purposes. It may, if it chooses, use its condemnation award to replace the condemned facilities and continue the same activity in them. But it has no obligation to do so, and the community has no recourse or compensable interest if the facilities are not replaced. Moreover, even if the condemnee does initially use the award to replace the facilities condemned, it has no obligation to continue that use during the useful life of the replacement facilities.[26]

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[25] The Second Circuit stated that "equitable principles undergirding just compensation require that the substitution cost be discounted by reason of the benefit which accrues to the condemnee when a new building replaces one with expired useful years." 403 F.2d at 804.

[26] The same is true of a public entity: "Modern government requires that its administrators be vested with the discretion to assess and reassess changing public needs." *United States* v. *Certain Property in the Borough of Manhattan, supra,* 403 F.2d at 803-804. The difference is that in the case of a private entity there is no legal or other requirement that the redirection of resources be in accordance with public needs, much less with the particular public need that was held to justify application of the substitute facilities doctrine.

In sum, application of the substitute facilities doctrine to private condemnees does not indemnify the community for its loss, as in the case of public condemnees, and provides more compensation than is required to make the condemnee whole.

III. THE COURT OF APPEALS' APPLICATION OF THE SUBSTITUTE FACILITIES DOCTRINE TO A RELIGIOUS ENTITY OFFENDS THE FIRST AMENDMENT

When the condemned property belongs to a church or other religious entity, application of the substitute facilities doctrine creates additional problems of a constitutional dimension. These problems include the requirement that a religious entity show that it confers a benefit on the community; the aid and advantage conferred on religion if the doctrine is made available; the difficulties of any attempt to ensure that the compensation award will be used by the entity for the community purpose that was found to justify it; and the effects on society of creating a governmental power to discriminate in favor of or against particular religious entities in making land-use decisions.

A. The central requirement adopted by the court below for a private condemnee's entitlement to the cost of substitute facilities is that the condemned facility "must provide a benefit to the community that will not be as fully provided after the facility is taken" (Pet. App. 26a). We share Judge Stern's view (Pet. App. 37a) that any judicial attempt to determine whether an activity of a religious organization provides a "benefit to the community" is "obnoxious under our constitutional framework. The judge or jury has no right to pass on the 'benefit' or the 'necessity' to the community of such installations." *Ibid.* We also agree with Judge Stern that it is inappropriate for the United States—and state and local governments as well—to be required, in defense of the public treasury, to present evidence and argument to establish that a religious organization's activity does not provide a public benefit (Pet. App. 37a-38a).[27]

The First Amendment requires the government to maintain a position of neutrality toward religious organizations. It may not favor particular organizations, nor may it "penalize or discriminate against

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[27] In an attempt to fulfill this obligation, counsel for the government argued in summation at the trial that even though respondent had not been operating its camps for monetary profit, testimony of respondent's witnesses could lead to the conclusion that the camps were operated for "a spiritual profit," in the sense of promoting the Lutheran religion or its teachings (A. 166; see Pet. App. 10a-11a). The majority of the court of appeals held that these remarks were legally incorrect and improper (Pet. App. 11a-13a). Judge Stern, while he joined that holding under force of the court's earlier decision, and while he considered it "grotesque to find the United States Government making such an argument," recognized that "this argument is justified—even compelled—by [the court's earlier decision] which requires the court to determine and the government to litigate the reasonable community necessity of the thing condemned" (Pet. App. 38a). Judge Rosenn concluded that the government counsel's line of argument was permissible, though it "may encounter first amendment problems at some point" (Pet. App. 59a n.12).

individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert* v. *Verner*, 374 U.S. 398, 402 (1963). See *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).

B. A compensation award to a religious entity for the cost of substitute facilities may be offensive to the First Amendment as an impermissible aid to religion. As we have noted, the cost of substitute facilities does not measure, and may greatly exceed, the monetary value of the property taken. The court of appeals concluded that the substitute facilities doctrine should nonetheless be employed in order to enable private condemnees to relocate and reestablish activities that provide a benefit to the community (Pet. App. 82a-83a). In this case, the camping activities in question are, in part, explicitly religious.[28] Moreover, the district court instructed the jury—and the court of appeals did not disagree—that "the furthering of the Church's religious mission may itself constitute a service to the community" (Tr. 798; see

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[28] As Judge Stern pointed out, each of the three camps included a chapel; cabin devotions were part of the camp day; and religious classes were part of the camping program (Pet. App. 38a; A. 120). Moreover, the camps were run by Lutheran clergymen; Lutheran children were given a slight price advantage; and the camps were operated by respondent in accordance with its articles of incorporation which provide that "'[t]he purpose of the corporation is to promote the Christian religion according to the tenets of faith as set forth in the Laws of the Lutheran Church of America'" (Pet. App. 38a; A. 95).

Pet. App. 55a n.10).[29] And the court of appeals did not flinch from the "closely analogous case" of "the condemnation of an ancient church building still in active use for religious purposes" (Pet. App. 79a).

The court of appeals has thus authorized an award which is increased above market value for the express purpose of permitting a religious entity to continue activities that are part of its religious mission. Further, the award takes no account of depreciation in the existing facilities, and thus finances the replacement of old facilities with new ones. Such an award seems inconsistent with the prohibition of the Establishment Clause against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 772 (1973), quoting *Walz* v. *Tax Commission,* 397 U.S. 664 (1970); *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973).

On the other hand, if respondent obtains an award under the substitute facilities measure and does not use it to construct replacement camping facilities, respondent will receive a windfall from the government without restoring the community benefit on which the award was premised. Yet, unlike a public condemnee, respondent is free to do as it wishes

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[29] "In determining whether or not the condemned facilities provided a reasonably necessary service to the community, you may consider that the camps were owned and operated by the Lutheran Church, and that the furthering of the Church's religious mission may itself constitute a service to the community" (Tr. 798; Pet. App. 55a n.10).

with its award. If it obtains the $4 or $5 million that it claims, it may use that money to train missionaries, pay Lutheran ministers, enhance its endowment, or serve any of its other institutional purposes. Even if respondent does use the award to construct replacement camping facilities, it need not use those facilities as camps indefinitely, but would be free to convert them into seminaries, religious conference centers, training facilities for missionaries, or any other religious uses.

In *Tilton* v. *Richardson,* 403 U.S. 672 (1971), this Court held invalid under the First Amendment a part of a federal statute providing construction grants for college and university facilities. The eligible recipients included church-related colleges and universities, provided that the facilities were used for defined secular purposes. However, this prohibition on religious use of the facilities was limited to a 20-year period. The Court held the law invalid insofar as the prohibition was limited to 20 years. *Id.* at 682-684 (Burger, C.J.); *id.* at 692 (Douglas, J.). As the Chief Justice explained: "If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Id.* at 683 (Burger, C.J.). That decision governs here. For application of the substitute facilities doctrine would support respondent's religious activities, whether in the form of replacement camps or in any other form to which respondent might freely decide to devote the compensation award.

C. Any attempt by the government or the courts to supervise or control respondent's use of its award would be at least equally objectionable. Any effort to require respondent to devote its award to replacing the condemned property with mixed-religion camps providing the same community benefit that a jury had found to exist—and requiring it to continue the operation of the new camps on the same basis—would entangle the government in the supervision of respondent's operations. The government could become embroiled in questions such as what action should be taken if applications from inner-city youths decline or if respondent should decide to drop or reduce the inner-city admissions, or whether respondent could properly reduce the time spent on nature study and increase the number of religious activities, or whether respondent could increase the price advantage given to Lutheran campers or vary the religious makeup of the camps.[30]

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[30] Indeed, since under the district court's instructions the jury would be permitted to find that a church's "religious mission" constituted a benefit to the community (see page 50 note 29, *supra*), the obligation to ensure that the condemnee used its award in such a way as to continue this benefit could require the government to determine whether the church's activities were consistent with that "mission." The First Amendment proscribes any governmental effort to define the proper scope of a church's religious mission, and the courts may not resolve doctrinal religious disputes. See *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). Cf. *New York* v. *Cathedral*

The First Amendment forbids "comprehensive, discriminating, and continuing state surveillance" which "involve[s] excessive and enduring entanglement between state and church." *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). See *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674-675.

D. Finally, the availability of a substantial financial benefit for religious entities under the substitute facilities doctrine may encourage community divisions along religious lines. Consideration of conferring such a benefit could influence a government's determination of whether a particular property should be condemned. The potential would arise for discrimination in favor of or against particular religious organizations, and supporters and opponents of a particular organization might be pitted against each other in attempts to influence the governmental decision (particularly if controversial or unconventional religious organizations are involved). Once the property is condemned, these divisions may be exacerbated by the attempt of the judge or jury to determine whether the condemned facility provided a "community benefit" entitling the religious organization to a substantially higher measure of compensation. This kind of "political division along religious lines" is "one of the principal evils against which the First Amendment was intended to protect." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622.

Academy, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment * * *.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 285671 287

Supreme Court, U. S.
FILED
FEB 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-488

IN THE

Supreme Court of the United States

October Term, 1978

UNITED STATES OF AMERICA,
Petitioner

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, and BENEDICT F. PASTORINI, et al., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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564.54 ACRES OF LAND, MORE OF LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 576 F. 2d 983. The opinion of the district court denying the motion for a new trial (Pet. App. 64a-75a) is not reported. The opinion of the court of appeals in the interlocutory appeal (Pet. App. 76a-87a) is reported at 506 F. 2d 796.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. § 1254(1) (1976).

COUNTERSTATEMENT OF QUESTION PRESENTED

When property owned by a non-profit corporation devoted to the use of others for public, charitable, religious or educational purposes is condemned, and when an award based on market value will not permit the preservation of such use, does the just compensation clause of the fifth amendment require that the property owner receive an award based on the cost of substitute facilities?

CONSTITUTIONAL PROVISION INVOKED

The fifth amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

COUNTERSTATEMENT

A. The Property and the Camping Program

The property at issue—owned by respondent Southeastern Pennsylvania Synod of the Lutheran Church in America (the "Synod"), a Pennsylvania non-profit corporation—consisted of approximately 304 acres situated on the bank of the Delaware River in northeastern Pennsylvania (A. 18-20, 23-28, 70). At the time of the taking, June 15, 1970, and for more than twenty years before, the property, and the improvements thereon, were devoted to

an extensive non-profit camping program (A. 73, 92, 95, 99-105).[1]

Generally the campers in the program came from modest or underprivileged backgrounds (A. 128). This fact is reflected in the availability of scholarships for underprivileged children and the modest fees charged the other campers (A. 115-16).[2] The camping population in the Synod program was racially and religiously mixed and was drawn from inner city, as well as rural, areas (A. 71-73, 91). Admission was determined strictly on a "first-come, first-serve basis" (A. 113). The program also included children with severe emotional problems and physical handicaps (A. 114-15).

The principal activities in the Synod camping program were the same as those at private camps—sports, swimming, fishing, boating, nature and arts and crafts (A. 109-12). In addition, the Synod designed special programs to meet the particular needs of emotionally disturbed and physically handicapped campers (A. 114-15). While the Synod did schedule a small portion of each week for devotional exercises and religious instruction (A. 120), the goal of the Synod camping program was to teach children from diverse backgrounds to live together (A. 91, 104, 123, 134).

The Synod camping program was operated as one unit except in terms of scheduling and accommodations, for which the property was divided into three camps (A. 108). Camp Miller, consisting of approximately 82 acres, was operated since the mid-1920's and had about 1,450 male campers per summer (A. 35-36). Camp Hagan, consisting of approximately 40 acres, was operated since 1937 as Camp Miller's sister camp and had about 1,400 female campers per summer (A. 36). Camp Ministerium, consisting of approximately 184 acres, began operating in the early 1950's for family camping (A. 36, 104). When the improvements to the property were completed in 1959, Camp Ministerium was operated as the co-educational equivalent of Camps Miller and Hagan (A. 104).

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[1] The camping program first began in the 1920's with the purchase of 82 acres (A. 35). It was not until the mid-1940's, however, that all the property involved herein had been acquired by the Synod (A. 36).

[2] The standard fee charged to attend the Synod camp was less than 50% of that charged by private-for-profit camps in the area (A. 128).

B. The Taking and the Search for Other Facilities

Although the formal taking did not occur until June 15, 1970, this impending development had been obvious for some time before, especially after the promulgation of the Delaware River Basin Compact in September, 1961. *See* Pub. L. No. 87-328, 75 Stat. 688-89, 711 (1961).[3] Accordingly, the Synod formed a search committee and, to aid in this effort to find another camp, employed a professional consultant (A. 92-93, 158). This search proved wholly unsuccessful.[4] In an effort to protect the future of its camping program, the Synod purchased unimproved property in the Pocono Mountains outside the proposed Tocks Island dam area, but near the threatened property (A. 93), so that when the taking occurred it could build facilities that would enable it to continue its camping program (A. 161).[5]

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[3] The property was taken for use as part of the Tocks Island Reservoir project. Pub. L. No. 89-158, 79 Stat. 612 (1965), 16 U. S. C. §§ 460o-460o-7 (1965). This project subsequently was aborted and the condemned property recently was designated by Congress as a component of the national wild and scenic rivers system. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 705, 92 Stat. 3467, 3527 (to be codified in 16 U. S. C. § 1274(20)).

[4] In fact, the search committee could not even find an unimproved site that had river frontage or frontage on a lake that did not pose pollution problems (A. 158).

[5] After the taking, the Synod continued to operate Camps Hagan and Ministerium through a leaseback arrangement with the

The central aspect of this case is that the Synod's camping program will be eliminated if the award for the property taken by petitioner is based on its market value. As testified to at trial, the cost of building functionally equivalent facilities, excluding the cost of the land,[6] would be $4,361,633[7] (A. 148-53). This includes the cost of complying with various environmental and building regulations from which the Synod previously had been exempt (A. 147-48; R. 366-67).

C. The Court Proceedings

Before trial, a ruling was sought on whether evidence of the cost of substitute facilities would be admissible. On January 15, 1974, the trial court held that the substitute facilities doctrine was limited to governmental condemnees (A. 38-49). The Synod then sought successfully to take an interlocutory appeal pursuant to 28 U. S. C. § 1292(b) (1976). In the interlocutory appeal, the Third Circuit reversed the trial court's ruling, concluding

> that the substitution of facilities measure of fair compensation is available to private owners of non-profit community facilities as well as to public owners of such facilities, in appropriate cases.

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5. (Cont'd.)

government (A. 70). Since Camp Miller was extensively vandalized after the taking, the Synod was unable to enter into a similar arrangement for its use (A. 107).

[6] The Synod purchased approximately 3,800 acres of land at a cost of less than $100 per acre (A. 93, 160). The cost of any such new land over and above that which is necessary for functionally equivalent facilities is not part of the Synod's claim.

[7] The $4,361,633 figure was not contradicted by petitioner at trial even though one of its expert witnesses had been "asked to make an evaluation of the three existing sites [Camps Miller, Hagan and Ministerium] and to prepare a cost estimate for a functionally equivalent substitute camp" (R. 306).

(Pet. App. 87a). The court did not, however, express any opinion on whether the substitute facilities doctrine would be appropriate in this case and remanded the matter to the trial court (Pet. App. 87a).

On remand, the trial was bifurcated. The issue in the first phase was whether the substitute facilities measure of compensation was available to the Synod. After instructing the jury, the trial court submitted a special interrogatory to the jury asking "does the doctrine of substitute facilities apply?" (A. 170). The jury determined that it did not (A. 171). The trial then proceeded to the second phase during which market value was determined to be $740,000 without reference to the cost of substitute facilities (A. 172).

On appeal, the Third Circuit reversed on the grounds that (i) the trial judge had inadequately instructed the jury on the law and (ii) the government had misstated the law to the jury in closing argument (Pet. App. 1a-28a). As a result, the Third Circuit remanded the case for a new trial in accordance with the more specific standards it set forth for determining the applicability of the substitute facilities doctrine.

The judgment of the Third Circuit was entered on March 27, 1978 (Pet. App. 88a-89a), and the government's petition for rehearing was denied on May 24, 1978 (Pet. App. 90a-91a). The government's petition for a writ of certiorari was granted by this Court on November 27, 1978 (A. 173).

SUMMARY OF ARGUMENT

I.

The just compensation clause of the fifth amendment is guided by the principle of indemnity, requiring that a property owner be made whole, and is based on fundamental considerations of fairness and equity. Thus, this Court has refused to make a fetish of market value in fulfilling the mandate of the just compensation clause and has attempted to fashion practical rules that will do substantial justice.

In the present case, it is undisputed that resort to the market value test will eliminate the Synod's use of the property as a non-profit camp for children and teenagers of modest or underprivileged means and diverse backgrounds. Under these circumstances, the court of appeals was correct in holding that the functionally equivalent substitute facilities doctrine—a doctrine that petitioner concedes is applicable to governmental condemnees—is available to the Synod as the correct and constitutionally mandated method of determining just compensation.

The heart of petitioner's argument is that the decision of the court of appeals will permit the Synod to recover what petitioner refers to as consequential damages. Aside from the inconsistency of this argument in light of petitioner's concession that just compensation for governmental condemnees includes the same measure of recovery correctly sought by the Synod, petitioner also fails to understand the meaning of the term consequential damages.

A. The term consequential damages is used by courts to delineate the point at which damages are considered too speculative, remote or incidental. In so limiting damages, this Court has been careful not to sanction a result that would create a wide disparity between the market value of the property and the undisputed loss to the property owner.

The real value of the property in the instant case is in its use, not its status in the marketplace or the earnings it might produce if commercially employed. Petitioner concedes that the market value of the Synod's property is wholly insufficient to enable the Synod to continue the use of the property (R. 170). The damages here are not speculative, remote or incidental. In this situation, the functionally equivalent substitute facilities doctrine is a well-settled approach for determining just compensation.

B-C. The functionally equivalent substitute facilities doctrine is an express recognition that the real value of some property is in its use and that when market value is wholly inadequate to preserve that use, an award of just compensation must be determined by the cost of functionally equivalent substitute facilities. This approach was first widely used to determine just compensation in connection with the taking of streets and highways having a negligible monetary value to the governmental property owner but a high value in use. It subsequently was used to determine just compensation in connection with the taking of schools, playgrounds and recreational buildings, properties that have a definite market value.

The court of appeals in the instant case refused to accept the distinction urged by petitioner, there as well as here, between governmental and non-profit non-governmental condemnees. The court held that "[i]n view of the express reference to *private* property [in the fifth amendment] and the absence of any reference to public property, it is inconceivable that the framers of the amendment intended to impose a greater obligation of indemnification on the national government toward the states and their subdivisions" (Pet. App. 85a) (emphasis in original). In rejecting this distinction, the court of appeals recognized that just compensation for a governmental condemnee should mean no more than just compensation for a non-governmental condemnee, at least when the property at issue is fully devoted to a public, charitable, religious or educational non-profit use. In either case the utility is similar and may be identical. In either case the property is held for the use of others—not the use of the property owner.

Subsequently, the court of appeals set down three conditions that the Synod must satisfy before the cost of functionally equivalent substitute facilities can be awarded. First, the property must not be operated for monetary profit (Pet. App. 10a-13a). This condition can be satisfied by the Synod. Second, it must be shown that after "exercising reasonable diligence," the property owner could not "have purchased a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility during a reasonable time after notice of condemnation" (Pet. App. 18a-19a) (footnotes omitted)· This condition can be satisfied by the Synod. Finally, the court of appeals explained that the third condition—reasonably necessary to public welfare—has two aspects: (i) the property "provide[s] a benefit to the community or [is] rationally related to the public welfare" and (ii) "the condemnor must not have eliminated the need or purpose which the condemned facility served" (Pet. App. 25a-26a) (footnotes omitted). Both aspects of this condition can be satisfied by the Synod.

In addition, petitioner's contention that the first aspect of the third condition "invites exceptionally free value judgments" (Brief of Pet., p. 19) is incorrect. This aspect does not invite a third party observer to make value judgments and should not be so construed. It requires the Synod to show by a preponderance of the evidence that the property at issue was devoted to a public, charitable, religious or educational purpose, and was fully used at the time of taking.

D. Application of the substitute facilities doctrine will not result in a windfall to the Synod. The Synod is not claiming that it is entitled to an award equal to the exact cost of functionally equivalent substitute facilities. If such new facilities will result in maintenance and capital savings, the Synod concedes that such savings should be discounted from the compensation award. Further, the facts in this specific case belie any notion that the Synod would use the proceeds of a just compensation award for a purpose other than building functionally equivalent substitute facilities. In the event a safeguard is deemed necessary, the full amount of the award could be paid out over the course of the construction project.

II.

Religion is not an issue here. The Synod is asking to be treated in the same manner as a similarly situated secular non-profit condemnee and in the same manner that petitioner concedes is applicable to governmental condemnees. In this light, the establishment clause of the first amendment is not implicated. In fact, to deny the Synod equal treatment would raise a very troublesome question under the free exercise clause of the first amendment.

The Synod is not asking for sponsorship or financial support. It is not asking for active involvement of the sovereign in religious activity. It seeks only equal, not preferential, treatment.

ARGUMENT

I. JUST COMPENSATION REQUIRES THAT THE SYNOD RECEIVE AN AWARD IN AN AMOUNT EQUAL TO THE COST OF FUNCTIONALLY EQUIVALENT SUBSTITUTE FACILITIES

The just compensation clause of the fifth amendment providing that "private property [cannot] be taken for public use, without just compensation"—like justice itself—embodies a range of fundamental considerations that cannot be expressed in a tidy phrase or a simple formula. The clause evokes more than simply "what a willing buyer would pay in cash to a willing seller" in a hypothetical marketplace. *United States v. Miller,* 317 U. S. 369, 374 (1943). It "evokes [basic] ideas of 'fairness' and 'equity,' " *United States v. Commodities Trading Corp.,* 339 U. S. 121, 124 (1950), and is guided by the broad principle of indemnification that a property owner "must be made whole"—neither more nor less. *United States v. Virginia Electric & Power Co.,* 365 U. S. 624, 633 (1961) (quoting *Olson v. United States,* 292 U. S. 246, 255 (1934)); *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U. S. 470, 478 (1973). *See* Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark,* 62 Iowa L. Rev. 1158, 1164 (1977). In determining the appropriate amount of compensation, "the question is what has the owner lost." *Kimball Laundry Co. v. United States,* 338 U. S. 1, 13 (1949) (quoting Mr. Justice Holmes in *Boston Chamber of Commerce v. Boston,* 217 U. S. 189, 195 (1910)). In recognition of these ideas and this guiding principle, this Court "has been careful not to reduce the concept of 'just compensation' to a formula" and has "endeavor[ed] to find working rules that will do substantial justice." *United States v. Cors,* 337 U. S. 325, 332 (1949). As a result, this Court has refused to make a "fetish" of market value in determining just compensation, *id.* at 332, and is not wedded to "inexorable rules." *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 402 (1949).

To read just compensation to mean rigid adherence to the monetary equivalent of market value, as petitioner does, is to dismiss history and to frustrate the guarantee made to a property owner by a clause specifically designed to protect against the enormity of the State's power to condemn and expropriate. The power of the sovereign to take property by edict is an awesome power, fraught with great potential for abuse. Recognizing the danger of granting the sovereign this power, the Founding Fathers restricted its exercise by providing in the Bill of Rights that no person could be deprived of his "property without due process of law" or "without just compensation." As Mr. Justice Brewer stated over eighty-five years ago:

> Obviously, this question [how much the government must pay as just compensation], as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.

Monongahela Navigation Co. v. United States, 148 U. S. 312, 324 (1893).

The present case posits the rare situation in which, as a result of special circumstances, the sole use of the property as a non-profit camp for children and teenagers cannot be preserved if just compensation is determined by the market value method. This, then, is not a case in which the property owner and the government are at odds over whether certain damages—referred to variously as speculative, incidental or consequential—are constitutionally required under the just compensation clause. Nor is it a case in which compensation determined by market value even roughly approaches making the property owner whole. The issue here is much more basic: can the full non-profit use of this property as a camp for children and teenagers of modest or underprivileged backgrounds be destroyed, with no amend from the sovereign, by the device of condemnation? No prior decision of this Court, nor any principle set forth in any such decision, suggests so harsh a result. On the contrary, under the principles heretofore articulated by this Court, by lower courts and by scholars in the field, the mandate of just compensation entitles the Synod to an award based on the cost of facilities that are the functional equivalent of, although not necessarily identical to, the facilities taken by petitioner. Further, it is totally inequitable to suggest, as petitioner does, that such non-profit use can be dismissed by labeling it as consequential damages. Yet, since this is the core of petitioner's argument, it will be dealt with first.

A. The Term Consequential Damages Refers to Incidental or Speculative Damages and Is Not a Reason to Refuse to Make a Property Owner Whole.

Petitioner wholly misconceives the meaning of consequential damages. This term is utilized by the courts to delineate the point at which the damages sought by the property owner are too speculative or incidental. Even then, it fails to provide any real guidance:

> The term "consequential damages" in [sic] ambiguous in character and is not truly relevant to any discussion respecting different classes of damage. In the

> proper sense of the term all damages must of necessity be consequential, since all damage is the consequence of an injurious act. Use of the term introduces an equivocation which is fatal to any hope of a clear settlement of the question. It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow in point of time upon the doing of the act complained of. It has been characterized as consequential damage to the actionable degree. The distinction seems to be between less and more remote damage and, in the last analysis, seems to be purely a matter of degree.

2A *Nichols on Eminent Domain* § 6.4432[1], at 6-171 (rev. 3d ed. 1976). *See, e.g.,*[8] *United States v. Westinghouse Electric & Manufacturing Co.*, 339 U. S. 261 (1950) (consequential damages, including removal or relocation costs, when entire leasehold interest taken—not compensable); *United States v. Commodities Trading Corp.*, 339 U .S. 121 (1950) (possible loss of profits because owner not permitted to wait for sale at more profitable price—not compensable); *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396 (1949) (possible loss of profits from sale in remote market not shown to be reasonably likely—not compensable); *United States ex rel. TVA v. Powelson*, 319 U. S. 266 (1943) (possible loss of profits from conceivable business venture—not compensable); *Olson v. United States*, 292 U. S. 246 (1934) (possible loss of profits from business venture not shown to be reasonably probable—not compensable); *Mitchell v. United States*, 267 U. S. 341 (1925) (loss of profits due to destruction of business—not compensable).[9] *But see, e.g., Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U. S. 470 (1973) (possible profits from potential lease renewal—compensated); *Kimball Laundry Co. v. United States*, 338 U. S. 1 (1949) (consequential damages, including loss of going-concern value, resulting from short-term taking—compensated); *United States v. General Motors Corp.*, 323 U. S. 373 (1945) (consequential damages, including removal, storage and return, when part of leasehold interest taken—compensated); *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893) (loss of profits due to destruction of business—compensated); *United States v. 1,380.09 Acres of Land*, 574 F. 2d 238, 241 (5th Cir. 1978), *petition for cert. filed*, 47 U. S. L. W. 3373 (U. S. Nov. 28, 1978) (No. 78-551) ("[i]n determining just compensation in condemnation cases, our central concern is to do justice;" appraisal fees incurred to demonstrate unfairness of price offered by government—compensated); *United States v. Certain Parcels of Land in Cattaraugus County*, 327 F. Supp. 181 (W. D. N. Y.), *aff'd*, 443 F. 2d 375 (2d Cir. 1970) (and cases cited therein) (loss of tax exemption—compensated).

Petitioner places primary reliance on cases involving business property that limit the recovery of consequential damages, but petitioner fails to acknowledge that in those cases the result reached approximated making the property owner whole. In fact, this Court explicitly has recognized that the award or denial of consequential damages rests on a consideration of what the property owner has lost and, thus, what is necessary to approximate making him whole. *Kimball Laundry Co. v. United States, supra,* 338 U. S. at 13. Illustrative of this recognition is the differing treatment that this Court has accorded going-concern value. When a taking of business property eliminates the going-concern value of the business, going-concern value is compensable under the just compensation clause. *Id.* at 13. *Cf. United States v. General Motors Corp., supra.* On the other hand, when the owner retains the going-concern value, the value is deemed a consequential damage and is not taken into account in determining the owner's compensation because the compensation received for the property under the market value test will enable the owner to acquire replacement property and make use of the going-concern value that he retained. *Rochester Urban Renewal Agency v. Patchen Post, Inc.,* 45 N. Y. 2d 1, 379 N. E. 2d 169, 171, 407 N. Y. S. 2d 641, 644 (1978). *See also* Note, *The Substitute Facilities Measure of Just Compensation: A Cautionary Remark, supra,* 62 Iowa L. Rev. at 1164.

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[8] Even when just compensation is determined by the cost of substitute facilities, speculative costs are not included in the award. *See, e.g., United States v. Streets, Alleys & Public Ways*, 531 F. 2d 882, 887 (8th Cir. 1976).

[9] *Mitchell is sui generis.* There it was undisputed that the property owner could not find other land with the soil needed for growning corn of a "special grade and quality." *Id.* at 343. Even though this Court denied the property owner's claim for business losses incurred as a result of the taking, this Court specifically stated that the property owner was entitled under the fifth amendment to take into account "[t]he special value of [the] land due to its adaptability for use in a particular business. . . ." *Id.* at 344.

Most importantly, with regard to non-profit property of the type at issue in the present case, the term consequential damages provides no guidance whatsoever, for the property's chief value is in its use—not its status in the marketplace. The damages here cannot be excluded from consideration in determining just compensation on the ground that they are speculative and conjectural. The damages are real. They are not remote or incidental. They have been established by testimony in the record which stands unchallenged. Precluding consideration of the damages here by labeling them consequential would produce a tremendous disparity between what the property owner would receive and what the property owner needs to approximately preserve the use to which the property was devoted. Moreover, to dismiss this disparity as consequential damages, as petitioner does, gives rise to the "manifest injustice" deplored by this Court in *United States v. Commodities Trading Corp., supra,* 339 U. S. at 123. It is for this very reason that courts have invoked the substitute facilities doctrine of compensation.

B. The Functionally Equivalent Substitute Facilities Doctrine Is a Well Settled Approach to Just Compensation.

It is undisputed here that an award to the Synod based on the conventional market value approach would destroy the Synod camping program.[10] A situation such as this arises infrequently. It arises only when the real value of the condemned property is in the human use to which it is dedicated, a use which furthers public, charitable, religious or educational purposes and which cannot be quantified in dollars and cents by the market value test. In such cases, courts have awarded just compensation based on the cost of substitute facilities.

This Court approved the substitute facilities doctrine of indemnification in *Brown v. United States,* 263 U. S. 78 (1923). There the federal government condemned a town and this Court endorsed compensation by substitution as the best means of making the property owners whole:

> The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate

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[10] At trial, petitioner stipulated that the cost of building functionally equivalent facilities far exceeded the fair market value of the camps (R. 170).

> on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservior, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the municipality, are injured. *A method of compensation by substitution would seem to be the best means of making the parties whole.*

Id. at 82-83 (emphasis added). By so stating, this Court recognized that the preservation of the use of the property condemned was a value requiring compensation by substitution to make all the property owners, individually and collectively, whole.

This doctrine for determining just compensation was first widely used in connection with the condemnation of streets and highways having a *de minimis* monetary value to the property owner but a high value in use. *See, e.g., United States v. Certain Lands Located in Townships of Raritan and Woodbridge,* 246 F. 2d 823 (3d Cir. 1957); *Washington v. United States,* 214 F. 2d 33 (9th Cir.), *cert. denied,* 348 U. S. 862 (1954); *City of Ft. Worth v. United States,* 188 F. 2d 217 (5th Cir. 1951); *Woodville v. United States,* 152 F. 2d 735 (10th Cir.), *cert. denied,* 328 U. S. 842 (1946); *Mayor and City Council of Baltimore v. United States,* 147 F. 2d 786 (4th Cir. 1945); *Jefferson County v. TVA,* 146 F. 2d 564 (6th Cir.), *cert. denied,* 324 U. S. 871 (1945). "Use of this principle in place of the conventional fair market value concept of determining compensation relieves public condemnees of hardships

they would otherwise face due to the absence of a market for streets and similar public facilities." *United States v. Streets, Alleys and Public Ways, supra,* 531 F. 2d at 885. Because the value of streets and highways is determined by their use, not in the marketplace, the courts first look to whether there is a need for substitute streets and highways. "If it is unnecessary to replace the roads or to provide substitutes for them, the [governmental property owners] have suffered no money loss and have been relieved of the burden of maintaining the roads taken." *United States v. Des Moines County,* 148 F. 2d 448, 449 (8th Cir.), *cert. denied,* 326 U. S. 743 (1945). In such circumstances, the substitute facilities doctrine is unavailable and market value is the basis of the award to the condemnee. *See, e.g., United States v. Certain Property in Borough of Manhattan,* 403 F. 2d 800, 804 n. 8 (2nd Cir. 1968). Conversely, when the use of the property should be preserved, just compensation includes all expenses reasonably required to provide the property owner with a functional equivalent.

Thus, for example, in *Town of Clarksville v. United States,* 198 F. 2d 238 (4th Cir. 1952), *cert. denied,* 344 U. S. 927 (1953), the United States was required to provide a substitute sewer system of equal utility to the one rendered useless by the construction of a dam. The old system had operated under an indefinite license that did not require the utilization of a sewage treatment plant. In contrast, the new facility was required to comply with pollution regulations mandating the installation of a sewage treatment plant. The court held that the property owner was entitled to a substitute sewer system that included the required sewage treatment plant.[11]

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[11] The court also held that the property owner was to be compensated for a reasonable period of time for the cost of operating and maintaining equipment that had been unnecessary under the old system.

> [W]e are not here dealing with a rigid, blind measure, that grants compensation only on a pound of flesh basis, but rather with an equitable concept of justice and fairness that accords with the Fifth Amendment's mandate. Accordingly, the equivalence requirement which must be met with respect to the substitute facility is more that of utility than of mere dollar and cents value.

Id. at 242-43. *See also United States v. 531.13 Acres of Land,* 244 F. Supp. 895 (W. D. S. C. 1965), *rev'd on other grounds,* 366 F. 2d 915 (4th Cir. 1966), *cert. denied,* 385 U. S. 1025 (1967) (a similar case involving a private property owner). *Cf. United States v. Wheeler Township,* 66 F. 2d 977 (8th Cir. 1933); *Town of Bedford v. United States,* 23 F. 2d 453 (1st Cir. 1927).

Further, the substitute facilities doctrine applies to the taking of facilities that have a definite market value [12] such as schools, playgrounds and public bath and recreation buildings. *See, e.g., United States v. Board of Education,* 253 F. 2d 760 (4th Cir. 1958) (school property); *United States v. Certain Land in Borough of Brooklyn,* 346 F. 2d 690 (2nd Cir. 1965) (playground facilities); *United States v. Certain Property in Borough of Manhattan,* 403 F. 2d 800 (2nd Cir. 1968) (public bath and recreation center).

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[12] As Judge Friendly has noted, courts often feel compelled when deviating from the strict market value approach to justify their action on the basis that the property has no market value, but this is largely a fiction:

> [W]here property with a high value for the use to which it is being put would have a much lower market value because of the paucity or absence of buyers for that use, the *courts consider value to the owner, sometimes finding it necessary to apologize for what is wrongly conceived to be a lapse from true doctrine by the rather obviously untrue statement that the property has "no" market value. . . .*

United States v. Certain Property Located in Borough of Manhattan, 306 F. 2d 439, 447 (2d Cir. 1962) (emphasis added).

In *United States v. Certain Land in Borough of Brooklyn, supra,* the Second Circuit, in providing for compensation by substitution in the case of a playground, stated:

> "The key notion [of just compensation] is indemnity, measured in money, for the owner's loss of the condemned property," Westchester County Park Comm'n v. United States, 143 F. 2d 688, 691 (2d Cir.), cert. denied, 323 U. S. 726, 65 S. Ct. 59, 89 L. Ed. 583 (1944), and we must be careful not "to translate a formula which produces fair results in many cases into a categorical imperative that must be applied regardless of consequences." United States v. Certain Property, 344 F. 2d 142, 146 (2d Cir. 1965). *Therefore, strict application of the market value rule of compensation will often be abandoned when the nature of the property or its uses produce a wide discrepancy between the value of the property to the owner and the price at which it could be sold to anyone else.* See 1 Orgel, § 37, at 173, cf. Spies & McCoid, Recovery of Consequential Damages in Eminent Domain, 48 Va. L. Rev. 437 (1962).

Id. at 694 (emphasis added). *Accord, United States v. Certain Property Located in Borough of Manhattan, supra,* 403 F. 2d at 802.

While most of the cases applying the substitute facilities doctrine have involved a governmental condemnee, the doctrine also has been utilized when there is a non-governmental condemnee. *See, e.g., United States v. Two Acres of Land,* 144 F.2d 207 (7th Cir. 1944), *cert. granted,* 324 U. S. 833, *appeal dismissed,* 324 U. S. 884 (1945) (church); *United States v. 43.635 Acres of Land,* 183 F. Supp. 168 (W. D. Mo. 1960) (easement for electric power lines); *United States v. 531.13 Acres of Land,* 244 F. Supp. 895 (W. D. S. C. 1965), *rev'd on other grounds,* 366 F. 2d 915 (4th Cir. 1966), *cert. denied,* 385 U. S. 1025 (1967) (waste disposal system). *See also Brown v. United States, supra* (town).

United States v. 531.13 Acres of Land, supra, presented a situation similar to that in *Town of Clarksville v. United States, supra,* except that *531.13 Acres* involved a purely private property owner while *Town of Clarksville* involved a governmental owner. Nonetheless, the court in *531.13 Acres* refused to rely on such a distinction and held that the condemnor must provide the private owner with substitute facilities including a treatment plant that was required as part of a new waste disposal system but which was unnecessary under the old disposal system.

The Seventh Circuit has addressed the application of the functional equivalent doctrine to property held for a religious use, specifically to a church. *United States v. Two Acres of Land, supra.* In considering what constituted just compensation for the church, the court looked to replacement value:

> In the case of non-profit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation. But people do not go about buying and selling country churches. Such buildings have no established market values. *Consideration must be given to the elements actually involved and resort had to any evidence available, to prove value, such as the use made of the property and the right to enjoy it.*

Id. at 209 (emphasis added).

Here, especially in light of the circumstances of the case, the Synod, like the governmental and non-governmental condemnees discussed above, should receive the benefit of the substitute facilities doctrine, as is more fully discussed hereinafter.

C. The Third Circuit Was Correct in Holding That the Functionally Equivalent Substitute Facilities Doctrine Is Available to Non-Profit Condemnees.

The substitute facilities doctrine is an explicit recognition that the true value of some property is in its use and that when market value of the property is insufficient to preserve that use, the substitute facilities doctrine is the only approach that will give real meaning and an ethical foundation to the just compensation clause. In this regard, the doctrine is not used in conjunction with the market value approach to valuation, but as an alternative to it. *United States v. Certain Property in Borough of Manhattan, supra,* 403 F. 2d at 803.

As can be seen from the cases discussed, *supra* at 17-22, the substitute facilities doctrine has been applied principally to the taking of publicly used property when the price that the property would bring in the marketplace would be wholly inadequate to preserve its use. The considerations compelling the result in those cases—considerations with which petitioner does not take issue—apply with equal force to property devoted to public, charitable, religious or educational uses owned by the non-profit private sector. To reach an opposite result would be to deny the right of the public to perform community service through the non-profit sector. To recognize and preserve this right is to avoid "manifest injustice," *United States v. Commodities Trading Corp., supra,* 339 U. S. at 123, and is to make the non-profit property owner whole, as required under the just compensation clause.

Cognizant of these considerations, the Third Circuit in the interlocutory appeal, 506 F. 2d 796 (1974) (Pet.

App. 76a-87a) [hereinafter cited as *Acres I*], held that "single purpose facilities, operated not-for-profit for a religious or charitable purpose (and having no ready market)" may be entitled to substitute facilities treatment[13] (Pet. App. 79a). The Court pointed out that the distinction urged by the government, there as well as here, between governmental and non-governmental property owners could not be justified by a rational interpretation of the fifth amendment's taking clause:

> In view of the express reference to *private* property [in the fifth amendment] and the absence of any reference to public property, it is inconceivable that the framers of the amendment intended to impose a greater obligation of indemnification on the national government toward the states and their subdivisions than toward private owners. . . . Accepting the interpretation that it [the taking clause] protects the value of community uses, there is no basis for distinguishing between governmental and private community uses.

(Pet. App. 85a-86a) (emphasis in original).

In fact, in applying the just compensation clause, a distinction cannot be drawn between non-profit property

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[13] The result of the Third Circuit in *Acres I* follows the rule adopted by the National Conference of Commissioners on Uniform State Laws. Section 1004(b) of the Uniform Eminent Domain Code provides that the minimum just compensation for

> property owned by a public entity or other person organized and operated upon a nonprofit basis is deemed to be not less than the reasonable cost of functional replacement if the following conditions exist: (1) the property is devoted to and is needed by the owner in order to continue in good faith its actual use to perform a public function, or to render nonprofit educational, religious, charitable, or eleemosynary services; and (2) the facilities or services are available to the general public.

devoted to the use of others for public, charitable, religious or educational purposes, on the one hand, and, on the other, property owned by a local government agency devoted to its functions. In either case the utility is virtually indistinguishable and may be identical. In either case the property involved is held for the use of others—not the use of the property owner in whom title to the fee resides. Thus,

> [i]n terms of indemnity, it is difficult to see why a more favorable measure of compensation should be applied to a public school than to a parochial school or church . . . .

Level, *Evaluation of Special Purpose Properties in Condemnation Proceedings*, 3 Urb. Law. 428, 432 (1971). Unless the value provided by the non-profit sector can be summarily dismissed, the just compensation clause must surely guarantee the preservation of such use by assuring functionally equivalent facilities.[14]

The Third Circuit in *Acres I* did not address two issues that merit discussion here. First, the court did not articulate the specific showing required of the Synod to prevail on its demand for substitute facilities. Second, the court did not address whether, if the Synod prevailed, it would receive the total cost of substitute facilities or that amount less a discount in the event that there are maintenance and capital savings. *See* discussion *infra* at 28.

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[14] Petitioner's suggestion that a governmental owner provides more fiscal safeguards than a non-profit non-governmental owner is unwarranted. The non-profit non-governmental owner, under the laws of the various states, is accountable on a daily basis—not just on election day. For instance, the Synod is fully accountable under the Pennsylvania Non-Profit Corporation Law of 1972 for any monies or property it presently has or will receive in the future. Such monies only may be used "for the purpose or purposes set forth in its articles" of incorporation. 15 Pa. C. S. § 7549(a) (1975). Moreover, property committed to such charitable purpose or purposes cannot be diverted by an amendment to the articles of incorporation unless permission is first obtained from a court pursuant to 15 Pa. C. S. § 7549(b) (1975). Indeed, not only are non-profit corporations strictly supervised, but their very assets are deemed "public property" for the specific purpose to which the property is devoted. *Mormon Church v. United States*, 136 U. S. 1, 59 (1890).

The second Third Circuit opinion in the instant case, 576 F. 2d 983 (1978) (Pet. App. 1a-63a) [hereinafter *Acres II*], attempted to deal with the first of these issues and posed three conditions that the Synod must satisfy before the cost of substitute facilities may be awarded:

> (1) the property must be operated on a not-for-profit basis; (2) there must be no ready market for the particular type of property; and (3) the property, or facilities must be "reasonably necessary to the public welfare"

(Pet. App. 9a-10a). Continuing, the Court explained that "not-for-profit" referred to monetary profit (Pet. App. 10a-13a). The condition "no ready market" was defined to mean that after "exercising reasonable diligence," the owner could not "have purchased a functionally equivalent replacement at a cost roughly equal to the fair market value of the taken facility during a reasonable time after notice of condemnation" (Pet. App. 18a-19a) (footnotes omitted).

Finally, the court in *Acres II* explained that the third condition, "reasonably necessary to public welfare," has two aspects: (i) the property "provide[s] a benefit to the community or [is] rationally related to the public welfare" and (ii) "the condemnor must not have eliminated the need or purpose which the condemned facility served" (Pet. App. 25a-26a) (footnotes omitted). The court summarized these two aspects collectively to mean that a facility must "provide a benefit to the community that will not be as fully provided after the facility is taken" (Pet. App. 26a). Both aspects of this third condition can be satisfied by the Synod.

In satisfying the first aspect requiring proof of "community benefit," the Synod at trial should have to show by a preponderance of the evidence that the property at issue was devoted to a public, charitable, religious or educational purpose, and was fully used at the time of the taking.[15] Insofar as the Third Circuit decisions in *Acres I* and *Acres II* are read to require an even greater showing of "community benefit," the Synod would take issue with such an interpretation, particularly if it were based on a distinction between a non-profit secular purpose and a non-profit religious purpose. It is the Synod's position that the "community benefit" aspect means no more than its non-profit facilitity is fully used for public, charitable, religious or educational purposes, irrespective of the social value a third party observer might attribute to it. In satisfying the second aspect, the Synod must prove that the non-profit use will be extant and not have been eliminated by the new use made of the property by the condemnor. *See, e.g., Woodville v. United States, supra,* 152 F. 2d at 737 (no need for substitute facilities when condemnor flooded town and "[a]ll the residents . . . moved away").

In summary, the Third Circuit was correct in holding that the functionally equivalent substitute facilities doctrine is available to non-profit condemnees. No other award will furnish the Synod with an amount that will permit it to preserve the use of its camp facilities. Nor will any lesser award comply with the constitutional guarantee of just compensation.

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[15] In the event that the property was unused prior to the taking, the property owner would not be entitled to an award based on the cost of substitute facilities. *See, e.g., California v. United States,* 169 F. 2d 914 (9th Cir. 1948).

D. Application of the Functionally Equivalent Substitute Facilities Doctrine Does Not Result in a Windfall.

Petitioner, in reproving the Synod for seeking a windfall, fails to understand that the Synod is not claiming to be entitled to an award in an amount equal to the exact cost of building functionally equivalent facilities. The Synod recognizes that such new facilities may result in maintenance and capital savings. Such savings concededly do not belong to the Synod and should be discounted from any compensation award determined under the substitute facilities doctrine. The manner of fashioning such a discount should be addressed by the trial court. *Cf. United States v. Certain Property in Borough of Manhattan, supra,* 403 F. 2d at 804.

Application of the substitute facilities doctrine will not result in a windfall to the Synod. There is no reason to believe that the Synod, or any other similar non-profit property owner, would disingenuously proclaim its desire to continue the use of its property. *See* Note, *Cost of Substitute Facilities As a Measure of Just Compensation When There Is a Private Condemnee,* 1975 Duke L. J. 1133, 1147. The record shows that the Synod bought land for the substitute facility in anticipation of the taking at a cost of about $321,000 (A. 93). This alone is an earnest of its good faith. Further, if an added precaution is thought necessary, the full amount of the award could be paid out over the course of the construction project. Pub. L. No. 71-736, 46 Stat. 1421 (1931), 40 U. S. C. § 258a (1976). *See* Note, *Just Compensation and the Public Condemnee,* 75 Yale L. J. 1053, 1058 (1966). The only other theoretical windfall would occur if, years later, there were a sale of the functionally equivalent facilities because the use no longer could be perpetuated. It should be noted that the same possibility exists with respect to a governmental condemnee. More significantly, in the case of a non-profit condemnee the proceeds, as explained previously, cannot be diverted from its non-profit purpose.[16]

II. AN AWARD OF JUST COMPENSATION DOES NOT ESTABLISH RELIGION AND AWARDING LESS THAN JUST COMPENSATION WOULD IMPAIR ITS FREE EXERCISE

Religion is not an issue here. The Synod is in no different position than any other property owner seeking to be made whole under the just compensation clause. If this Court determines that awarding the cost of substitute facilities, under certain circumstances, to non-profit property owners is required by the just compensation clause, the establishment clause is not implicated. Indeed, to deny a non-profit religious property owner the same treatment accorded a similarly situated non-profit secular property owner would raise very troubling questions under the free exercise clause. *See, e.g.,* Note, *Cost of Substitute Facilities As a Measure of Just Compensation When There is a Private Condemnee, supra,* 1975 Duke L. J. at 1145 n. 55; Comment, *The Lord Buildeth and the State Taketh Away—Church Condemnation and the Religion Clauses of the First Amendment,* 46 U. Colo. L. Rev. 43 (1974).

The establishment clause, relied on by petitioner, prohibits the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Committee for Public Education v. Nyquist,* 413 U. S. 756, 772 (1973) (quoting *Walz v. Tax Commission,* 397 U. S. 664, 668 (1970)); *Levitt v. Committee for Public Education,*

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[16] As a practical matter, the windfall argument is exaggerated since the property at issue in these cases generally does not command much attention in the marketplace.

413 U. S. 472, 481 (1973). None of these elements is present here. By seeking just compensation for values expropriated by petitioner the Synod is not asking for government "sponsorship" or "financial support." It is asking for compensation and not for grants-in-aid. Petitioner's contention reduces to this absurdity: condemnation of a church is not compensable because a compensation award would sponsor or provide financial support for religion. Obviously such is not the law. The Synod asks for equal not preferential treatment and for the same award of just compensation for its camps in use as would be made to a city for its camps if condemned under similar circumstances. The Synod's position is *a fortiori* in respect of the language of *Walz v. Tax Commission,* 397 U. S. 664 (1970). The Synod does not distinguish itself, or religious organizations generally, from other non-profit property owners. As this Court said about New York and its tax exemption of churches:

> It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.

Id. at 672-73.

Nor does the case involve any form of "active involvement of the sovereign in religious activity." *Committee for Public Education v. Nyquist, supra,* 413 U. S. at 772. The Synod has, indeed, welcomed the suggestion that the trial court might mold and monitor a substitution of facilities award so as to insure that it be used to create the substitute and, thus, to allay petitioner's fears and suspicions that the money might be diverted to other objectives. Surely such a molding or monitoring would be no more than a control of disbursements during construction and not an involvement in the affairs of the substitute facility after completion. It would involve the court in religion no more than the bank that might control the disbursements of a construction loan.

As for petitioner's fear that the community benefit test to which the Third Circuit adverted would involve the judiciary in the evaluation of religious elements, it need only be said that, properly understood in the light of the analysis set forth above in this brief, the test requires no such thing. It asks only that there be a community that enjoys the activities of a "non-profit, quasi-public corporation"[17] dedicated to public, charitable, religious or educational purposes. The courts need not assess the social value of the activities, be they religious or otherwise.

It is submitted that, if the first amendment is an issue here, it supports the Synod's case. In short, the Synod cannot as a non-profit, quasi-public corporation be denied the same justice of substitution of facilities that petitioner concedes is applicable to schools, playgrounds and recreational centers.

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[17] These words come from *Walz v. Tax Commission,* 397 U. S. 664, 673 (1970), which includes churches with other non-profit corporations in the reference to "non-profit, quasi-public corporations."

III. CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 1979

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

No. 78-488

In the Supreme Court of the United States

October Term, 1978

United States of America, petitioner

v.

564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Commonwealth of Pennsyvania, and Benedict F. Pastorini, et al., Southeastern Pennsylvania Synod of the Lutheran Church in America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-488

UNITED STATES OF AMERICA, PETITIONER

v.

564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, COMMONWEALTH OF PENNSYLVANIA, AND BENEDICT F. PASTORINI, ET AL., SOUTHEASTERN PENNSYLVANIA SYNOD OF THE LUTHERAN CHURCH IN AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondent seeks to recast the principles of eminent domain law established by this Court. Recognizing that many decisions of the Court have held that consequential or incidental damages are not part of the constitutionally required measure of just compensation, respondent claims that this case is rare and different—"[a] situation such as this arises infrequently" (Br. 17). What is unusual, respondent says, is that to deny respondent an award

measured by the cost of substitute facilities "would produce a tremendous disparity between what the property owner would receive and what the property owner needs to approximately preserve the use to which the property was devoted" (Br. 16–17). Respondent's claim is that, regardless of the value of its condemned camps, just compensation requires that it receive an award sufficient to enable it to continue its camping program at another site.[1]

Respondent's concept of just compensation is at odds with the settled principles of eminent domain law. As we explained in our opening brief (at 22–30), the fundamental rule limits just compensation to the monetary value of the property taken, excluding incidental or consequential losses suffered by the owner. "One principle from which [this Court] has not deviated is that just compensation 'is for the

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[1] This case is said to be special because "the property's chief value is in its use—not its status in the marketplace" (Br. 16). But it is not at all uncommon that a property suffices for its owner's use, and may even be uniquely valuable to the owner for that use, and yet its market value on condemnation falls far short of enabling the owner to purchase a new property equally suitable, or suitable at all, for carrying on that use. This may be true, for example, of an old factory long used by a firm and adapted to its special needs; of a family's home that is large but old and deteriorating; or of any structure which—like respondent's camps—has been exempt from regulatory requirements with which a new structure would have to comply. It was true in *Mitchell* v. *United States*, 267 U.S. 341 (1925), where the condemnees were "unable to reestablish themselves elsewhere in their former business" of growing and canning a special grade and quality of corn (*id.* at 343); nevertheless, they were not entitled to compensation for the destruction of their business as distinguished from the taking of their land (*id.* at 345).

property, and not to the owner.' " *United States* v. *Bodcaw Co.*, No. 78–551 (Feb. 26, 1979) (per curiam), slip op. 1 (quoting *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326 (1893)). As the Court explained in *United States* v. *General Motors Corp.,* 323 U.S. 373, 382 (1945):

> When [the government] takes the property, that is the fee, the lease, whatever he may own, terminating altogether his interest, under established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so the consequences are often harsh. For these whatever remedy may exist lies with Congress.

That is also the holding of *Mitchell* v. *United States,* 267 U.S. 341 (1925), which respondent attempts to discount as "*sui generis*" (Br. 15 n. 9)—notwithstanding that it has been repeatedly cited and followed by this Court. See, *e.g., United States* v. *Bodcaw Co.,* No. 78–551 (Feb. 26, 1979), slip op. 2; *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 236 (1960); *Kimball Laundry Co.* v. *United States,* 338 U.S. 1, 12, 22 (1949); *United States* v. *Petty Motor Co.,* 327 U.S., 372, 377–378 (1946); *United States ex rel. TVA* v. *Powelson,* 319 U.S. 266, 281 (1943).

The decisions from which respondent seeks to draw support (Br. 15) do not, in fact, deviate from the rule that just compensation is required only for the value of the condemned property, not the condemnee's other losses. *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470 (1973), does not hold, as respondent claims (Br. 15), that "possible profits from [a] potential lease renewal" are compensable. *Almota* holds that the improvements which the condemnee made on the leased premises should be valued "in place over their useful life—taking into account the possibility that the lease might be renewed, as well as the possibility that it might not," because that would be the price "a willing buyer would have paid for the improvements." 409 U.S. at 474. The Court emphasized that the award was for the value of these improvements, not for "business losses," stating (409 U.S. at 475-476 n. 2):

> Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that. *Mitchell* v. *United States,* 267 U.S. 371, did hold that the government was not obliged to pay for business losses caused by condemnation.
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> * * * *

And in *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 312, the Court did not hold, as respondent claims (Br. 15), that "loss of profits due to destruction of [a] business" was compensable. The Court held that the value of the condemned property—a lock and dam on the Monongahela River—was to be determined, like the value of any other property, by

assessing "its productiveness—the profits which it brings to the owner." 148 U.S. at 328. Since the lock and dam were located on a busy commercial waterway, and the profits from the tolls collected were substantial, that profitability enhanced the value of the property, in the same way that rich soil for farming or a good commercial location enhances the value of other property. 148 U.S. at 328-329.

Respondent also relies (Br. 15) on the decision of the court of appeals in *United States* v. *1,380.09 Acres of Land,* 574 F. 2d 238, 241 (5th Cir. 1978), and quotes the court's statement that "[i]n determining just compensation in condemnation cases, our central concern is to do justice." In that decision the court of appeals affirmed an award of compensation to the condemnee for the expenses of securing appraisals of its land "to demonstrate the unfairness of the price offered by the United States," on the ground that otherwise the condemnee would not have been "made whole for the Government's taking of its land" (574 F. 2d at 241). That decision has now been summarily reversed by this Court. *United States* v. *Bodcaw Co.,* No. 78-551 (Feb. 26, 1979). The Court held (slip op. 2) that "indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled."[2]

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[2] The other decisions of this Court that respondent cites (Br. 15), *Kimball Laundry Co.* v. *United States,* 338 U.S. 1 (1949), and *United States* v. *General Motors Corp., supra,* are inapposite

In sum, respondent's claim for an award based on the amount necessary to reestablish its camping operations in new facilities—rather than on the value of the condemned property—is outside the scope of the just compensation that the Constitution requires. As this Court commented in *United States* v. *Bodcaw, supra,* slip op. 2–3: "Perhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action. * * * But such compensation is a matter of legislative grace rather than constitutional command."[3]

2. Respondent argues (Br. 17–29) that the substitute facilities measure of compensation should be extended to private condemnees when they are not-for-

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because they involved the special circumstances of the temporary taking of property. See our opening brief at 27 n. 9. As the Court explained in *Kimball Laundry, supra,* 338 U.S. at 15 (footnote omitted), moving expenses and going concern value may be compensable in the case of a temporary taking because "[t]he temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result. Compare *United States* v. *General Motors Corp.*, 323 U.S. 373, with *United States* v. *Petty Motor Co.*, 327 U.S. 372."

[3] It may be that respondent, in contending that the chief value of the condemned property is in its use (see note 1, *supra*), means only that the property's value is enhanced by the fact that it is well adapted for use as a camp. We have no quarrel with that proposition. See, *e.g.*, *Mitchell* v. *United States, supra,* 267 U.S. at 344–345. At the trial there was extensive evidence of the sales prices of other, comparable camps (Tr. 263–264, 269–276), and the jury's award of fair market value no doubt reflected—in accordance with the closing argument of respondent's counsel (Tr. 932)—the special value of the property due to its adaptability for camp use.

profit entities. But, as we explained in our opening brief (at 33–47), the substitute facilities doctrine was developed by the lower courts to meet the unique needs of public condemnees, and the decisions applying the doctrine provide neither reason nor authority for extending it to privately owned property.

Respondent questions (Br. 7) why just compensation for government condemnees should entail a different measure of compensation than is required for private condemnees. While this Court has never endorsed the substitute facilities doctrine even for public condemnees,[4] the rationale for the doctrine as applied to governmental entities has been twofold: (1) In many cases the test of fair market value is inherently unworkable because the condemned facilities (streets, highways, bridges) are never bought and sold in the open market (see our opening brief at 34–35 and authorities cited); and (2) even when a market value could arguably be established for the condemned facility (as in the case of schools and other public buildings), the doctrine is applied because—and only if—the public entity is under an obligation to replace the facility (see *id.* at 35–38 and authorities cited). When the condemnee is thus required to replace the facility, the cost of doing so can reasonably be considered, not incidental or consequential, but a loss resulting directly and certainly from the condemnation.[5] Moreover, a public entity, unlike a private one (including not-for-profit organizations), may own and operate its property only for the benefit of the community it serves. Thus, even if the substitute facility should someday be sold—as respondent acknowledges is possible (Br. 28–29)—or diverted to a different use, the proceeds or the new use will necessarily benefit the public as a whole, and cannot provide a windfall for non-public interests. See Comment, *"Substitute Facilities" Compensation for Private Condemnees: United States* v. *564.54 Acres of Land,* 92 Harv. L. Rev. 514, 521 (December 1978); see also our opening brief at 36–39, 46 and note 26.[6]

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[4] Respondent errs (Br. 17–18) in claiming that *Brown* v. *United States*, 263 U.S. 78 (1923), was such an endorsement. See our opening brief at 34 n. 17.

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[5] As stated in *United States* v. *City of New York*, 168 F. 2d 387, 389–390 (2d Cir. 1948):

"When no substitute facilities are necessary, it follows that no compensation is allowed. The rationale is clear. If the municipality has not had to provide substitutes, then it has suffered no financial loss and hence is not entitled to substantial damages."

[6] Respondent asserts that in the case of a private nonprofit condemnee as well, "the proceeds * * * cannot be diverted from its non-profit purpose" (Br. 29), and respondent points out that its own monies may only be used, under Pennsylvania law, " 'for the purpose or purposes set forth in its articles' of incorporation" (*id.* at 25 n. 14). But respondent's articles of incorporation provide that " '[t]he purpose of the corporation is to promote the Christian religion according to the tenets of faith as set forth in the Laws of the Lutheran Church of America' " (Pet. App. 38a; A. 95). This is quite a different purpose from that of a governmental entity in this country; it is a different purpose from the one which, under both opinions of the court of appeals, justified application of the substitute facilities doctrine to the award of compensation for respondent's camps.

Respondent acknowledges that, in the case of public condemnees, the substitute facilities doctrine is applied only where the courts determine that "there is a need" for the substitute facilities (Br. 19). Yet respondent goes on (*id.* at 26–27) to reject, for a private condemnee such as itself, both the test of " 'reasonably necessary to the public welfare' " and the more relaxed test of "benefit to the community" that the court of appeals successively propounded in its effort to transplant the substitute facilities doctrine from public to private condemnees. Respondent now asserts (Br. 27) "that the 'community benefit' aspect means no more than its non-profit facility is fully used for public, charitable, religious or educational purposes, irrespective of the social value a third party observer might attribute to it." In thus reading out of the proposed subsitute facilities test, where private condemnees are concerned, all vestiges of the public need or public benefit concept, respondent has broken away from the doctrine applicable to public condemnees on which its test purports to be based. Respondent's new position emphasizes the lack of any foundation for applying the substitute facilities doctrine to private condemnees.

Contrary to respondent's claim (Br. 21–22), there is no precedent for applying the substitute facilities measure to a private condemnee. The cases respondent cites (*ibid.*) show no such application. In *United States* v. *Two Acres of Land,* 144 F. 2d 207, 209 (7th Cir. 1944), cert. granted, 324 U.S. 833, cert. dismissed, 324 U.S. 884 (1945), the court of appeals held only that for "non-profit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation." The court explained (144 F. 2d at 209): "But people do not go about buying and selling country churches. Such buildings have no established market values." We have no objection to the practice of admitting evidence of cost of replacement as probative of the value of the condemned property where it is difficult to obtain evidence of comparable sales. Such "other means of measuring value may have relevance—but only, of course, as bearing on what a prospective purchaser would have paid." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396, 402 (1949); see *United States* v. *Certain Interests in Property, Etc.,* 296 F. 2d 264, 270 (4th Cir. 1961). Here, of course, respondent does not seek to introduce evidence of the cost of substitute facilities as probative of the market value of the condemned property—a value that was determined by the jury to be $740,000.[7]

3. Respondent attempts to minimize the financial consequences of extending the substitute facilities measure of compensation, as a constitutional requirement, to the condemnation of privately owned property. But those consequences would be substantial. Upholding the decision of the court of appeals would lead to inflated awards against federal, state, and local governments in a broad expanse of cases, and would produce windfalls for condemnees.

Respondent urges that "[a] situation such as this arises infrequently" (Br. 17). But in fact, as we have already noted (see note 1, *supra*), it is far from unusual for the owner of facilities which are not new, and which may not meet present regulatory requirements, but which suffice for the owner's needs, to have difficulty in obtaining an equally suitable new site for no more than the market value of the condemned property. Moreover, respondent now argues (Br. 27) that the substitute facilities measure should be applied whenever there is a taking of not-for-profit property devoted to some "public, charitable, religious or educational purpose," as long as the owner, exercising reasonable diligence, cannot purchase a "functionally equivalent" replacement at a cost roughly equal to the fair market value of the condemned property. In respondent's present view, no other showing of being "'reasonably necessary to the public welfare'" or "'community benefit'" should be required (Br. 26–27). This standard, which is even broader than the court of appeals' decision, would be widely applicable and would permit a high proportion of nonprofit condemnees, if not all of them, to claim substitute facilities compensation.

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[7] The other cases respondent cites (Br. 21-22) are also inapposite. In *United States* v. *531.13 Acres of Land*, 366 F.2d 915 (4th Cir. 1966), cert. denied, 385 U.S. 1025 (1967), the court of appeals reversed the district court's decision (244 F. Supp. 895 (W.D.S.C. 1965)), awarding compensation for the cost of constructing a new waste disposal system to the owner of a factory whose flowage rights in a river were taken. The court of appeals did not consider the proper measure of compensation because it held that there had been no taking. 366 F. 2d at 920.

In *United States* v. *43.635 Acres of Land*, 183 F. Supp. 168 (W.D. Mo. 1960), the United States negotiated a settlement with a power company, the N. W. Electric Power Cooperative, Inc., to permit the relocation of a transmission line from land on which the power company held a right-of-way easement. The United States then condemned an easement overlapping the area of the company's original easement. The only question before the court was the value of the company's interest. The portion of the decision that respondent apparently relies on, 183 F. Supp. at 170, is a dictum concerning what the measure of compensation would have been if the company had not settled its claim. The opinion does not indicate to what extent the power company had public service obligations that would place it under a legal duty, like a governmental entity, to replace the facility taken.

(In taking facilities held by utility companies, railroads and the like, the government frequently agrees to relocate such facilities as the most cost-effective means of settling condemnation cases. The Corps of Engineers has statutory authority to relocate highways, easements and rights-of-way taken for dam and reservoir or flood control projects. 33 U.S.C. 701c-1. See also *Seneca Nation of Indians* v. *United States*, 338 F.2d 55, 56 (2d Cir. 1964).)

The substitute facilities measure would give the private condemnee an award substantially exceeding the value of the condemned property. In this case, for example, where the jury found the fair market value to be $740,000, respondent has claimed that the cost of substitute facilities will be in excess of 4 or 5 million dollars (Pet. App. 78a–79a; A. 154; Br. 5). Respondent now attempts (Br. 28) to discount this problem by conceding that the new camp facilities constructed to replace those condemned "may result in maintenance and capital savings," which should be deducted from its award. Respondent does not say what it means by "maintenance and capital savings," and respondent in the trial court sought the full cost of constructing the substitute facilities without any such deduction.[8] Whatever the meaning of respondent's concession, it is clear that the deductions now proposed would not reduce the award to fair market value, or, it appears, even to the cost of replacement decreased by the depreciation of the condemned property. To the extent that awards based on the cost of substitute facilities exceed the value of the condemned property, they constitute windfalls to the condemnee.

The windfall is enhanced by the fact, noted in our opening brief (at 46), that awarding a private condemnee the cost of substitute facilities does not ensure that the condemnee will in fact replace the condemned facility or will continue its operation indefinitely. Respondent now suggests (Br. 28) that the government could ensure replacement of the facility by paying the award out gradually over the course of the construction project. Among other objections to such a procedure where a church is involved, at present there is no statutory authority under federal law for such a practice.[9] Moreover, the suggestion is inconsistent with respondent's position (Br. 27) that the use of property by a non-profit entity for any "public, charitable, religious or educational purpose" suffices to invoke the substitute facilities doctrine, without any showing of "reasonable necessity" or "community benefit" from the particular use. On this theory, it would make no difference whether respondent used its award to replace its camps or devoted the money instead to one of respondent's purely religious purposes.

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[8] As respondent states (Br. 5), its expert testified that the cost of building functionally equivalent facilities would be $4,361,633 (A. 154), an estimate he described as "conservative" (*ibid.*). The expert was not asked by respondent's counsel about any "maintenance and capital savings" or other amounts that should be deducted from the cost of building the facilities. In his closing argument to the jury, respondent's counsel relied on the expert's figures (Tr. 735–736) and asked the jury (Tr. 740) to "award to the Synod the cost of constructing substitute facilities which are the functional equivalent of the three river camps as of the date of condemnation, based on the testimony and the numbers supplied by [the expert]." He added (*ibid.*) that "anything less than that, will mean, according to the testimony of the witnesses that you have heard, that there will be a substantial cutback in this camping program that has been conducted over these years and this would be a catastrophe."

In any event, as respondent implicitly concedes (Br. 28–29), even if it were possible to ensure that the condemnee would use its award to build substitute facilities, the condemnee would ultimately receive a windfall when it sold the new—and substantially more valuable—facilities. See Comment, *supra,* 92 Harv. L. Rev. at 521–522.

4. Respondent has now disavowed both of the positions taken by the court of appeals in seeking to apply the substitute facilities doctrine to private condemnees. The court first indicated, in its interlocutory opinion, that the condemned facility must be "reasonably necessary to public welfare" (Pet. App. 83a; see also *id.* at 20a–27a). In its second decision the court relaxed its test, requiring only that the facility "provide a benefit to the community that will not be as fully provided after the facility is taken" (Pet. App. 26a). But the standards adopted in the court's second decision are vague and unworkable, and as applied to a religious organization they are constitutionally offensive (see our main brief at 41–45, 47–53). Apparently recognizing the force of these objections, respondent now declines to defend even the weak "community benefit" standard of the decision below, and urges (Br. 27–28) that the substitute facilities measure should be made available to any non-profit condemnee, so long as its condemned property was devoted to some "public, charitable, religious or educational purpose."

Under respondent's new theory, many of respondent's factual claims in this case are irrelevant. It is irrelevant whether the condemned camps were, as respondent claims (Br. 3), operated for campers mainly of modest or underprivileged background, or whether the camping population was "racially and religiously mixed and was drawn from inner city, as well as rural, areas," or whether the devotional exercises and religious instruction at the camps occupied only "a small portion of each week." Under respondent's present theory, the substitute facilities doctrine would be equally applicable if the camps were entirely religious in nature, charged fees that only the rich could afford, and were limited to Lutherans. Indeed, the doctrine would be equally applicable where what is condemned is not a camp but a facility whose purpose is exclusively "religious." The only real requirement, under this theory, is that the condemnee be a not-for-profit entity—a "non-profit property owner[ ]" (Br. 30).

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[9] The Declaration of Taking Act, ch. 307, 46 Stat. 1421, 40 U.S.C. 258a, requires the United States to deposit the estimated just compensation when it initiates a condemnation proceeding, in order to obtain immediate title to the property. See *United States* v. *Miller,* 317 U.S. 369, 381 (1943). The landowner is entitled to withdraw the government's deposit immediately, and is also entitled to interest, from the date of taking, on any deficiency caused by the entry of a judgment greater than the government's initial deposit. *United States* v. *0.45 Acre of Land in Town of Groton,* 151 F.2d 114, 115 (2d Cir. 1945).

Respondent's theory is thus much broader than that adopted even in the second opinion of the court of appeals. And while this theory may not raise the same difficulties of application that the court's position raises, it is at least equally objectionable. As we have already noted, its broad applicability would lead to substantially higher condemnation awards in a great many cases—potentially in every case involving a not-for-profit condemnee. And there is no legal support for this beneficence. The substitute facilities doctrine as applied to public condemnees provides no support, for it is based both on the requirement of replacing the facility and on the assurance that the benefit of the award will accrue to the public. There is no basis for assuming that simply because an entity operates on a not-for-profit basis—whether it is a church, a club, a fraternal organization, a trade association, or whatever—its interests are the same as the interests of the public.[10] Most important, there

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[10] Dissenting from the decision below, Judge Rosenn criticized the majority's "community benefit" standard on the ground that it might include "private nonprofit swimming clubs, ice-skating

is no basis—and respondent suggests none—for concluding that this is what the Constitution requires. Whatever the situation might be if Congress or a state legislature were to enact legislation providing for substitute-facilities compensation for all not-for-profit entities (cf. *Walz* v. *Tax Commission,* 397 U.S. 664 (1970)), there is nothing in the Constiution that requires the government to provide such a benefit to that group.

Indeed, there is nothing in the Constitution that would support limiting the beneficiaries, as respondent apparently would to not-for-profit entities. If respondent is correct, we do not understand why the substitute facilities measure of compensation should not also apply, by the same constitutional command, to the condemnation of profit-making facilities that the owner cannot replace for roughly the fair market value of the condemned property. The loss to the owner is the same in either case, and the public may benefit from profit-making facilities no less than from non-profit ones. Respondent has not answered the point, advanced by Judge Stern (Pet. App. 34a–35a) and by us (main brief at 43–44), that even under

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clubs, tennis clubs, and myriads of other nonprofit recreational and social organizations who might discern a need for their facilities but which the community might find frivolous" (Pet. App. 54a n. 9). In reply, the majority relied on the role of the jury, assuming that "any facility a jury finds beneficial to the community or rationally related to public welfare would not be found 'frivolous' by the community" (*id.* at 25a n. 15). Under respondent's proposed standard, there is no such determination by the jury or anyone else, and all nonprofit organizations would automatically qualify.

the "community benefit" test adopted by the court of appeals, there is no rational basis for refusing to extend the substitute facilities doctrine to profit-making entities as well as nonprofit ones.[11] Under respondent's new test, dispensing with the "community benefit" criterion, the problem is at least equally grave, for it is difficult to find anything in the Constitution which requires the substitute facilities measure of compensation for non-profit entities and denies it to profit-making ones.[12]

In the end, the distinctions drawn by respondent and by the court of appeals must all be rejected. At least where private property is concerned, there is no justification for departing from the traditional limitation of just compensation to the monetary equivalent of the condemned property. The traditional definition of just compensation reflects a carefully fixed balance between the interests of the public and those of the property owner. In the absence of legislative adjustments, that balance should be preserved.

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[11] Respondent suggests only that nonprofit property is like governmental property in being "held for the use of others—not the use of the property owner in whom title to the fee resides" (Br. 25). It is hard to see the sense in which a nonprofit social or religious organization, for example, holds its property "for the use of others" rather than for the use of its own members; at the same time, it is hard to see the sense in which the property of a legitimate theater or a profit-making camp is not held "for the use of others," while the property of a nonprofit theater group or a nonprofit camp is. The essential distinction between profit-making and nonprofit entities is in the presence or absence of the profit motive.

[12] When Congress, in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, went beyond the constitutional requirements and provided for the payment of certain categories of consequential damages resulting from federal condemnations, it made these benefits available equally to profit-making and to nonprofit organizations. See our main brief at 29–30.

CONCLUSION

For these reasons, as well as the reasons set forth in our main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

MARCH 1979

U.S. GOVERNMENT PRINTING OFFICE: 1979